91-797

No. 91-

In the Supreme Court of the United States

OCTOBER TERM, 1991

CARIBE SHIPPING CO., INC.,
PETITIONER,

v.

PEDRO JUAN SOTO AND CARMEN LUGO FILIPPI,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

PETITION FOR WRIT OF CERTIORARI

HARRY ANDUZE MONTANO
117 Eleanor Roosevelt Ave.
Suite 303
Hato Rey, P.R. 00918
(809) 250-7171
Attorney for Petitioner

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Court of Puerto Rico erred in imposing upon an agent of a shipping carrier the Harter Act duty of notification of arrival of the goods to the consignee.

II. Whether the Supreme Court of Puerto Rico erred in requiring that the notice of arrival of goods to a consignee be made through means other than by ordinary mail, in order to accomplish "proper delivery" under the Harter Act.

PARTIES TO THE PROCEEDING

Petitioner, who was appellee below, is Caribe Shipping Company, Inc.

Respondents, who were appellants below, are Pedro Juan Soto and Carmen Lugo Filippi.

TABLE OF CONTENTS

Table of Authorities Cited

Cases:

Statutes:

Miscellaneous:

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TO THE HONORABLE COURT:

Petitioner, Caribe Shipping Company, appellee in the Court below, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Puerto Rico entered in the above case on April 26, 1991. The decision reversed the judgment of the Superior Court of Puerto Rico, Carolina Part, entered on July 16, 1987.

Opinions Below

The Opinion of the Supreme Court of Puerto Rico is yet to be officially published and is reproduced at page 1 of the Appendix.

The judgment of the Supreme Court of Puerto Rico is reproduced at page 18 of the Appendix. The dissenting opinion of Associate Justice Mr. Negron Garcia is reproduced at page 20 of the Appendix.

The Resolutions of the Supreme Court of Puerto Rico denying the first and second motions for rehearing filed by petitioner are reproduced at pages 28 and 30 of the Appendix, respectively.

The resolution and the judgment of the Superior Court of Puerto Rico were not published. They are reproduced at pages 32 and 46 of the Appendix, respectively.

Jurisdiction

The Supreme Court of Puerto Rico entered judgment on April 26, 1991. The Supreme Court of Puerto Rico entered orders denying petitioner's two petitions for rehearing on June 26, 1991 and August 2, 1991, respectively.

The jurisdiction of the Supreme Court is invoked pursuant to 28 USC §1258 and Rule 10.1(b) of the Rules of the United States Supreme Court.

Statutory Provisions Involved

Sections 1 and ~~2~~ of the Harter Act, Title 46 United States Code Sections 190 and 191, provide as follows:

> Section 1: It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping

document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Section 2: It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any way be lessened, weakened, or avoided.

Statement of the Case

Respondents commenced this case on April 20, 1977 by filing an action in the Superior Court of Puerto Rico seeking damages in connection with the loss of a trunk of their property that had been shipped from Zaragoza, Spain, to San Juan, Puerto Rico, on July 12, 1976. Ap. 3.

Respondents' claim was that petitioner, as agent of the vessel that transported the trunk to Puerto Rico, was liable to them for the loss of the trunk by failing to give them notice of its arrival. At the time of filing the complaint, respondents knew the identity of the petitioner's principal and that petitioner had acted at all times as agent. Nevertheless, they only claimed against petitioner alleging that it had the duty of notifying them of the arrival of the trunk. *Id.*

The trunk and all of its contents were lost as a result of a fire that occurred on August 19, 1976 that destroyed the warehouse where it had been stored by the Customs Service due to respondents' failure to timely claim it at the port. Ap. 51-53.

Respondents alleged that the trunk contained numerous notations, drafts, notes, working papers and unpublished short stories and novels that were the product of several years of work while they resided and studied in Europe. Respondent Pedro Juan Soto is a well known Puerto Rican writer.

Petitioner answered the complaint denying any liability and asserting numerous affirmative defenses, including that it had given notice of arrival to respondents and that the claim was limited and controlled by the provisions of the United States Carriage of Goods by Sea Act ("C.O.G.S.A."), Title 46, United States Code Sec. 1300 *et seq.* Ap. 32-33.

The parties agreed to litigate first the alleged negligence and the court held a hearing to receive evidence pertaining to that sole issue.

On March 28, 1985 the Superior Court rendered a decision holding petitioner liable for the damages claimed while finding that petitioner had the duty to notify the consignee of when and where the merchandise was to arrive. Ap. 32.

The Superior Court made other findings of fact which included the following: respondents had retained the services of Fernando Roque, Transportes Internacionales, SA, ("Fernando Roque") to transport the trunk from Zaragoza, Spain, to San Juan, Puerto Rico; Fernando Roque shipped the trunk on July 12, 1976 from Barcelona, Spain, aboard the M/V AMERSFOORT of the KNSM Lines; the trunk was received in San Juan, Puerto Rico, on July 26, 1976; petitioner, as agent of the vessel's line, unloaded the trunk; the United States Custom Service sent the trunk to Almacenes Miramar on August 12, 1976 pursuant to the customs regulations in force at the time, since the trunk had not been claimed; on August 19, 1976, a fire started in the premises of Perez Distributors, Inc. which spread to nearby structures, including the premises of Alma-

cenes Miramar, destroying the trunk and its contents in the process; as a matter of routine and in the normal course of business, petitioner would send by ordinary mail to the consignees of the merchandise aboard the vessels of lines for which it was agent a copy of the bills of lading with a stamp of "Arrival Notice"; said arrival notice was sent to respondents by ordinary mail informing them that the merchandise would arrive on July 27, 1976 and that if it was not claimed it would be sent to a public warehouse on August 3, 1976 approximately; said arrival notice was never received by respondents; by the end of July respondents received a letter from Fernando Roque dated July 19, 1976 advising them that the trunk had been shipped aboard the M/V AMERSFOORT and enclosing the original and a copy of the bill of lading; respondents learned for the first time of the identity of the vessel's agent after they wrote a letter to Fernando Roque on November 4, 1976. Ap. 33-35.

Petitioner moved the Superior Court for a rehearing and submitted extensive memoranda arguing that C.O.G.S.A. preempted any state law remedy and that the federal statute imposed a $500.00 limit in cases in which crated merchandise was not declared. In such motion the petitioner argued in the alternative, that liability could not be imposed even under the Puerto Rico Tort Claims Statute. Ap. 49-50.

On July 16, 1987, the Superior Court entered judgment vacating its prior order and dismissing the complaint altogether based on the fact that the fire that had destroyed the trunk was an act of God that acted as intervening cause, exonerating petitioner from any liability for the claimed damages. Ap. 46.

Respondents appealed to the Supreme Court of Puerto Rico which reversed the Superior Court judgment. The Supreme Court held that since it was an action in admiralty, federal law had to be applied but that the Superior Court had jurisdiction to resolve the issue. Ap. 4-6. The Supreme Court then decided that C.O.G.S.A. was not applicable since it only applies when the loss occurs while the merchandise is in transit. Ap. 10-11.

The Supreme Court of Puerto Rico held that the Harter Act was applicable and that petitioner's duty to notify the arrival of the merchandise stemmed both from the Act and the bill of lading. Ap. 11. The Supreme Court of Puerto Rico reasoned that the merchandise had not been actually or constructively delivered to the consignee and that Caribe Shipping was liable for the damages, noting that the Harter Act makes the *carrier* liable for the damages resulting from the loss of the merchandise in cases where "proper delivery" had not occurred. Ap. 15.

Supreme Court of Puerto Rico Associate Justice Mr. Negron Garcia subscribed a dissenting opinion, arguing that petitioner had not been negligent since it had been proven at trial that petitioner had in fact sent a notice of arrival to respondents. Ap. 25. According to Puerto Rico Supreme Court Associate Justice Mr. Negron Garcia, this notice was sufficient according to the customs and usages of the port and the applicable law and regulations. *Id.* The dissenting opinion also stated that it was unreasonable to require the agent to make any additional notices, or to make the notice in any other way. Ap. 26.

Petitioner filed two requests for rehearing, arguing: (i) Since petitioner was not the carrier, nor a party to the shipping contract, but only acted as the vessel's agent, the petitioner had no duty to notify the consignee of the arrival of the merchandise and that the duty of notification was the carrier's. (ii) It is untenable to impose the duty of notification upon agents such as petitioner under the Harter Act. (iii) To require that the notice of arrival be made through means other than by ordinary mail would increase shipping costs to such a degree that it would disrupt the shipping industry as it is known today.

The Supreme Court of Puerto Rico denied the requests for rehearing on June 26 and August 2, 1991, respectively. Ap. 28 and Ap. 30.

Reasons for Granting the Writ

The Supreme Court Of Puerto Rico Has Decided A Question Of Shipping Agent Liability Under The Harter Act In Conflict With The Doctrines Developed By This Court And Federal Courts Over The Last Century

I. Introduction

On April 26, 1991, the Supreme Court of Puerto Rico entered judgment against petitioner Caribe Shipping Co., Inc. ("Caribe Shipping"), the shipping agent in Puerto Rico of the line of the vessel used by Fernando Roque, an ocean carrier, to fulfill his obligation with respondents. Fernando Roque had contracted with the respondents to ship from Zaragoza, Spain, to San Juan, Puerto Rico, a trunk that contained personal effects.

The Puerto Rico Supreme Court found Caribe Shipping liable for failure to deliver the merchandise to the respondents. This ruling conflicts with the Harter Act, 46 U.S.C., Section 190, as literally read and as interpreted by this Court and by all the courts of appeals that have faced the issue, to wit: those of the First, Second, Fifth and Ninth Circuits. The Harter Act imposes a nondelegable duty to deliver on the carrier, so Caribe Shipping, as shipping agent, was never under a duty to deliver the merchandise to the respondents, the shippers and consignees, nor to notify them of the merchandise's arrival.

Moreover, even if the Supreme Court of Puerto Rico was accurate in finding that Caribe Shipping had a duty to deliver the merchandise to the consignee, this Court and the courts of appeals of the First and Second Circuits would have found that the manner in which Caribe Shipping made the delivery was in conformity with the carrier's obligation under the Harter Act. Caribe Shipping made a proper delivery to the respondents, and the Supreme Court of Puerto Rico erred in finding to the contrary.

II. THE HARTER ACT IMPOSES A NONDELEGABLE DUTY TO DELIVER ON THE CARRIER, SO THE SUPREME COURT OF PUERTO RICO ERRED IN FINDING PETITIONER, A SHIPPING AGENT, LIABLE UNDER A DUTY TO DELIVER THE GOODS TO RESPONDENTS.

A. *The Harter Act*

In 1893 the Congress of the United States passed the Harter Act, 46 U.S.C., Sections 190-196, in an attempt to achieve a balance of interests between ocean marine carriers, merchants and owners of merchandise that used ships for transport. See Gillmore & Black, *The Law of Admiralty*, 2nd Ed., The Foundation Press, Inc., N.Y. 1975, page 119 *et seq.*

The Act was intended to prohibit the practice of ocean marine carriers of including in bills of lading or other shipping documents clauses geared to relieving them of any liability derived from their guilt or negligence when carrying, safeguarding or delivering the merchandise. *Id.*; see also Villareal, Dewey, *Carriers' Responsibility to Cargo and Cargo's to Carrier*, 45 Tulane Law Rev. 770, 773 (1971).

As this Court noted in *The Delaware*, 161 U.S. 459, 471-472 (1896):

> The act was an outgrowth of attempts . . . to limit as far as possible the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, and negligence in navigation, and other forms of liability which had been held by the courts of England, if not of this country, to be valid as contracts and to be replaced even when they exempted the ship from the consequences of her own negligence.

The Harter Act regulates the rights and obligations of the parties from the time the goods are loaded until their offloading, warehousing and delivery. Although in the area of foreign

trade the Harter Act was partially superseded by passage of C.O.G.S.A., that later statute defines the duty of care only from the time the goods are loaded on the ship until the time when the cargo is released from the ship's tackle at port. 46 U.S.C., Section 1301(e)[1]; *Tapco Nigeria, Ltd.* v. *M/V Westwind*, 702 F.2d 1252, 1255 (5th Cir. 1983).

The Harter Act applies to the period from the discharge of the cargo from the vessel to its proper delivery. Baer, *Admiralty Law of the Supreme Court*, The Michie Co., 1979, page 497; *Tapco, Id.; Allied Chemical* v. *Companhia de Navegacao*, 775 F.2d 476 (2nd Cir. 1985) *cert. denied* 475 U.S. 1122; *Allstate Ins. Co.* v. *Imparca Lines*, 646 F.2d 166, 168 (5th Cir. 1981).

B. *Carrier's nondelegable duty of proper delivery*

The Harter Act imposes upon vessels a duty of "proper loading, stowage, custody, care [and] proper delivery" which cannot be avoided by the insertion of exculpatory clauses in the bills of lading. As this Court summarized in *Union Pacific R. Co.* v. *Burke*, 255 U.S. 317, 321 (1921):

> This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption

[1] In 1936, Congress passed the Carriage of Goods by Sea Act, which applies to maritime foreign trade, and to local maritime trade when the parties so agree. Contrary to the Harter Act, the provisions of C.O.G.S.A. have a limited coverage as to the period of maritime transport: it regulates the rights and obligations between the consignee and the carrier during the floating tract. 46 U.S.C., Section 1301. This is from the time that the goods are loaded onto the vessel until they are discharged at the port. *Archilla* v. *Smith*, 106 D.P.R. 538, 542 (1977); see citations of the Supreme Court of Puerto Rico, at pages 11-12 of its Opinion. Ap. 7-9.

> from the consequences of its own negligence or that of its servants.[2]

See also 46 U.S.C., Section 190; *Tapco Nigeria, Ltd.* v. *M/V Westwind*, *supra*, 702 F.2d at 1255.

The Harter Act prohibits and invalidates agreements which would relieve the carrier from liability for loss arising from its negligence in loading or delivery. *Union Pacific R. Co.*, *supra*, 255 U.S. at 321; *Calderon* v. *Atlas Steamship Co.*, 170 U.S. 272, 276 (1898) ("But as the stipulation in the bill of lading was one which the Harter Act prohibited, it is necessary to refer to this act to hold the company chargeable with negligence.")

Thus, the Harter Act invalidates any term in a bill of lading which undertakes to lessen or avoid the carrier's obligation to make a "proper delivery" of the cargo. "Proper delivery" has long been defined as a delivery on the wharf provided the carrier ". . . give(s) due and reasonable notice to the consignee, so as to afford him a fair opportunity of providing suitable means to remove the goods, or put them under proper care and custody." *Richardson* v. *Goddard*, 23 How. 28 (1860). See also *Black Sea & Baltic General* v. *S.S. Hellenic Destiny*, 575 F. Supp. 685, 687 (S.D. N.Y. 1983); *Levatino Company, Inc.* v. *American President Lines, Ltd.*, 233 F.Supp. 697, 701 (S.D. N.Y. 1964).

For example, in *Isthmian Steamship Co.* v. *California Spray-Chemical Corp.*, 300 F.2d 41 (9th Cir. 1962), the parties had agreed to a special lighterage clause which provided that the carrier could terminate his obligation of proper delivery by depositing the goods in lighters. Consequently, the

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[2] Under the common-law, the liability of carriers was enunciated in *New Jersey Steam Nav. Co.* v. *Merchants' Bank of Boston*, 47 U.S. (6 How.) 344, 381 (1848), as follows:

> The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident, . . . in other words, the Act of God or the public enemy.

clause in question not only provided for lighterage, but also relieved the carrier from liability for negligence during lighterage. The Ninth Circuit found that the Harter Act did not permit parties to agree to a mode of delivery which would have relieved the carrier of liability. Such an agreement would circumvent the very purpose of the Harter Act, which is to prevent a carrier from inserting a clause under which it was "relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery" of cargo. 49 U.S.C., Section 190. The court held that "a carrier cannot relieve itself of liability occurring during such lightening or at any time *before proper delivery.*" *Id.* at 47 (emphasis added). Accord, *Central Trading Corp.* v. *M.V. "Dong Myung"*, 361 F.Supp. 302 (S.D.N.Y. 1973) (The Harter Act renders ineffective any attempt to limit liability by providing a specific method of delivery and purporting to relieve the carrier of responsibility if that method is followed.).

Just as a carrier cannot contract a mode of delivery that would relieve it from its duty of proper delivery under the Harter Act, the Harter Act prevents the carrier from passing this duty onto another. In *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U.S. 366 (1925), the consignee of a sugar carload brought suit against Missouri Pacific R. Co., the connecting carrier named in the bill of lading, to recover for the loss of part of the cargo during its transportation. The loss had occurred while the cargo was in possession of the St. Louis-San Francisco Railroad which had been employed by Missouri Pacific to carry the cargo to the consignee's warehouse. Missouri Pacific requested that it be exempt from liability based on a provision of the bill of lading that stated that no connecting carrier would be liable for any damage which did not occur on its own lines. The court below refused the argument and held Missouri Pacific liable. This Court affirmed while holding that since Missouri Pacific had been the named connecting carrier in the bill of lading and St. Louis-San

Francisco was not, it could not be exempted from liability. The Court specifically held that the St. Louis line "... was simply the agent of the Missouri Pacific for the purpose of delivery. The Missouri Pacific was the delivering carrier, and is liable as such."

An identical result was reached in *David Crystal, Inc.* v. *Cunard Steam-Ship Co.*, 339 F.2d 295 (2nd Cir. 1964), *cert. denied* 380 U.S. 976 (1965), wherein the carrier discharged the goods on a pier to the custody of its stevedore, who misdelivered the goods. The bill of lading between the shipper and the carrier contemplated the discharge on a pier as proper "delivery." The Second Circuit ruled that the bill of lading in this respect was null and void under the Harter Act. The Court further stated that the carrier was like a bailee for the shipper and remained liable for the safety of the goods "in whatever hands he may place them." 339 F.2d at 298.

C. *Erroneous ruling of the Supreme Court of Puerto Rico that petitioner was obligated to deliver*

In its Opinion, the Supreme Court of Puerto Rico proceeded to examine the liability of Caribe Shipping under the "proper delivery" standard of the Harter Act without making an explicit, preliminary ruling on whether Caribe Shipping was under a duty to effect "proper delivery" pursuant to that statute. The Supreme Court of Puerto Rico ruled, based on a finding of the lower Puerto Rico court, that Caribe Shipping "was the ship's agent in charge of offloading, stowing, releasing and delivering the cargo," (Ap. 3) but it did not consider whether the carrier could have delegated its "duty to deliver" to the shipping agent of its choice, or whether the shipping agent, who was not a party to the shipping contract, could be held liable for any breach of that contract.

The implicit ruling of the Supreme Court of Puerto Rico that Caribe Shipping, as shipping agent, was obligated under the Harter Act to effect delivery to the respondents was clearly

in error. That obligation was at all times with Fernando Roque, the carrier. The Supreme Court of Puerto Rico provided no legal reasoning upon which the shipping agent, petitioner herein, should be held accountable for delivery of goods to the shipper, and the respondents never presented any evidence of contractual liability of Caribe Shipping to deliver.

Petitioner Caribe Shipping was not the carrier. It did not have any duties to the shipper under the Harter Act. If Caribe Shipping had any duties at all, they would have been to KNSM Lines, with whom it had a contractual arrangement, not to the respondents. In *Gulf Puerto Rico Lines* v. *Maicera Criolla, Inc.*, 309 F.Supp. 539 (D.P.R. 1969), for example, the court dismissed the claim of a shipper against a shipping agent for damaged goods. The contract to ship was between the shipper and the carrier: the defendant was only the shipping agent of the carrier in Puerto Rico. The district court reasoned that the "universal maxim of contract law" applied, *res inter alios acta alteri nocere non debet:* things done or agreed between strangers ought not to injure those who are not parties to them. 309 F.Supp. at 540. Accord *Medina* v. *South Atlantic & Caribbean Line, Inc.*, 342 F.Supp. 498, 499 (D.P.R. 1972).

Since the Harter Act imposes upon the carrier the duty to "properly deliver", a shipper cannot recover for loss or damage to the goods from the shipping agent of the carrier in connection with the shipping agent's performance in delivery. Caribe Shipping had no duty under the Harter Act to deliver the goods to respondents. No liability may be imposed upon it for not performing an act which was not legally required.[3]

The decisions of this Court and those of the First, Second, Fifth and Ninth Circuits do not allow a carrier to release itself

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[3] The Supreme Court of Puerto Rico correctly held that the Puerto Rico Tort Statute, Art. 1802 of the Civil Code (31 LPRA 5141), was not applicable to the case at bar. Ap. 11. Petitioner takes no exception to that part of the court's analysis. However, the Supreme Court clearly erred when it found petitioner liable for ". . . the alleged breach of a contractual obligation of the ocean marine shipping contract whose genesis stems from the duty imposed on the stevedore by the authority conferred by legislation in the federal laws on admiralty, the Harter Act in this particular case." *Id.*

of the duty of "proper delivery" imposed by the Harter Act upon the carrier and the carrier alone, and this cannot be done by judicial fiat either. The Supreme Court of Puerto Rico erred in placing the duty to deliver on the shipping agent. To allow such a rule to stand will disrupt the proper balance in the general maritime law carefully developed by this Court and other federal courts during the past century:

> There is a general rule of law that common carriers cannot stipulate for immunity from their own or their agents' negligence. While this general rule was fashioned by the courts, it has been continuously accepted as a guide to common carrier relationships for more than a century and has acquired the force and precision of a legislative enactment. *United States* v. *Atlantic Mut. Ins. Co.*, 343 U.S. 236, 239 (1951).

III. Even if Caribe Shipping had a duty to deliver the merchandise to the respondents, the Supreme Court of Puerto Rico defied the decisions of this Court and of the Courts of Appeals for the First and Second Circuits in finding that proper delivery was not made.

A. *What constitutes proper delivery*

In order to terminate their responsibility for ocean-going cargo, the Harter Act requires carriers to make "proper delivery." *Black Sea & Baltic General* v. *S.S. Hellenic Destiny*, 757 F.Supp. 685, 687 (S.D. N.Y. 1983).

Both this Court and the Court of Appeals for the First Circuit have ruled that a carrier makes "delivery" when it delivers the goods on the wharf, and gives to consignee "due and reasonable notice" of arrival, so as to afford consignee "a fair opportunity to remove the goods or put them under proper care and custody." *The Eddy*, 5 Wall 481, 495 (1867); *Calcot, Ltd.* v. *Isbrandtsen Company*, 318 F.2d 669, 673 (1st Cir.

1963); see also *Kinderman & Sons* v. *Nippon Yussen Kaisha Lines*, 322 F.Supp. 939, 941 (E.D.P. 1971).

B. *Erroneous receipt and intent requirements for "proper delivery" imposed by the Supreme Court of Puerto Rico*

The Supreme Court of Puerto Rico ruled there was no delivery of the merchandise because respondent consignee Mr. Soto "had neither possession nor physical control of his goods and neither did he receive due notice that his merchandise had arrived, so that he could have a reasonable opportunity to pick it up." First, as the holdings in *The Eddy* and in *Calcot*, cited above, make clear, physical control of goods is not required for delivery.

Second, the requirement for notice is that the *carrier* give reasonable notice so as to afford a fair opportunity for pick-up. As the trial court found, both the carrier and Caribe Shipping *did* give notice of arrival via ordinary mail. The Supreme Court of Puerto Rico disregarded this fact and based its analysis principally on the finding by the trial court that Mr. Soto did not receive the notice sent by Caribe Shipping. *Receipt* of notice by the consignee, however, is not the standard.

The Supreme Court of Puerto Rico ruled that delivery did not occur partially because there was no "actual delivery" of the merchandise, that is, that Mr. Soto did not acquire possession of the goods. This requirement is not contemplated by the Harter Act. Any such requirement would have the onerous effect of making a carrier liable for damage or loss even for goods that were not picked up by the consignees for months or years. This actual delivery argument was made by the plaintiff in *Morse Electro Products Corp.* v. *S.S. Great Peace*, 437 F.Supp. 474, 486 (D.N.J. 1977), a misdelivery case. The court stated:

> If the Court were to read the notice requirement as plaintiff would have it do, the Harter Act would apply until the plaintiff or its agents came to pick up the cargo. If this were so, then the Harter Act would apply in every misdelivery case, because misdeliveries by definition occur before the rightful owner has had an opportunity to pick up the cargo. Cases such as *David Crystal* clearly demonstrate that such a reading of the notice requirement of the Harter Act is incorrect.

Actual receipt of goods is not required for "proper delivery."

The Supreme Court of Puerto Rico also ruled that Mr. Soto did not "receive" due notice. This ruling is based on its interpretation of three findings by the trial court: (i) Mr. Soto never received the notice sent by Caribe Shipping; and (ii) the document sent by the carrier was insufficient as a matter of law. The third and last was that:

> The testimonial evidence presented about the sending out of the notice was unable to establish, in our judgment, that said notice was given diligently nor that there was any interest in the consignee receiving the same. Neither was it shown that it was done in accordance with what has been stated herein, the sense that the notice should have been sent once the ship was ready to offload. (Ap. 13.)

In sum, the Puerto Rico Supreme Court's concerns were: 1) that Mr. Soto never received the noticing document sent by Caribe Shipping; 2) that the notice was not given "diligently"; 3) that Caribe Shipping did not have an "interest" in having consignee receive the notice it sent, and 4) that the notice was sent three days prior to the ship's arrival.

To start with the last concern first, *Morse Electro Products*, *supra*, 437 F.Supp. at 486-487, addresses this point. In that case, as in this case, the carrier notified the consignee of the

expected date of arrival before the cargo arrived. The court ruled that such notice was sufficient: "The notice given here, though it was of the expected date of arrival, was sufficient to permit Morse [the consignee] to set in motion the steps necessary for pick-up of the cargo." There is no theoretical or practical reason why a carrier cannot mail to the consignee notice of the arrival of cargo three days prior to the ship's landing. In fact, such a practice shows diligence on the part of Caribe Shipping, with which the court was concerned, because the early mailing assures that the consignee will get the earliest notice possible after arrival.

The finding that Caribe Shipping did not show an "interest" in consignee receiving notice appears to be the imposition of an element of intent for the effectuation of "proper notice." There is no legal authority whatsoever that a carrier must be "interested" in the consignee to constitute delivery, and this is an arbitrary requirement imposed by the Puerto Rico Supreme Court. But even if this were a valid requirement, Caribe Shipping did show such an interest. Caribe Shipping testified that, although it understood that it had no legal obligation to serve notices to the consignees, it has employees in charge of sending out notices and that they have sent out thousands of such notices. Surely Caribe Shipping has an interest that the owners or consignees retrieve their belongings so as not to overload or clutter its port facilities.

The Supreme Court of Puerto Rico argued that Caribe Shipping did not adduce evidence that the notice was given "diligently". The trial court found, however, that the notice was sent via ordinary mail. Any more burdensome requirement will necessarily transform the shipping industry due to costs required to personally serve arrival notices or to mail notices through certified mail and then follow up on them. With regard to this requirement, Puerto Rico Supreme Court Associate Justice Negron-Garcia, in his dissent to the majority Opinion, stated:

> If the government's postal machinery is late or fails to deliver, what greater diligence can be required from the shipping agent who by provision of law has some cargo under his possession and control only for the *short* period of five (5) days? Is it that notice via ordinary mail is not sufficient? Is it that a *photocopy* of the stamped document (stipulated by both parties) and the uncontroverted testimony of the employee Santiago Seijo are not sufficient proof? Can the majority be requiring, *sub silentio*, a *more formal* notification? If so, must it be via certified mail? Given personally? (Ap. 25.)

As stated in testimony, the arrival notice was sent in the regular course of business in sending out thousands of notices, although Caribe Shipping understood that it had no obligation to send those notices. In doing so, Caribe Shipping fulfilled the carrier's obligation to properly deliver, even though, as agent, it had no duty or legal obligation towards the consignee.[4]

On the other hand, respondent Soto did *not* act with diligence. Mr. Soto admitted, and the trial court found, that Mr. Soto had been advised that his personal effects were en route. He knew the name of the ship and its destination. Yet he did not inquire into his cargo until almost four months later. Under these circumstances, his efforts, almost four months after he received notice, were belated and unjustified.

Finally, there is no requirement for proper delivery that the consignee actually receive the notice. Obviously, the carrier should send notice in the most efficient way calculable for the consignee to receive it. But the carrier cannot be held responsible for the negligence or omissions of the U.S. Postal Service.

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[4] Even if Caribe Shipping had not given notice, it still could not be held liable to respondents under the Puerto Rico Torts Claim Statute, 31 L.P.R.A. 5141, since both the Supreme Court of Puerto Rico and the Court of Appeals for the First Circuit have consistently held that "failure to perform an act gives rise to a cause of action only when there is a legal duty to act." *Muniz* v. *National Can Corp.*, 737 F.2d 145, 148 (1st Cir. 1984); *Estremera* v. *Immobiliaria*, 109 P.R.Dec. 852 (1980).

All that this Court and those of the First and Second Circuits require is "suitable and reasonable notice of arrival," so as to afford consignee a fair opportunity to remove the goods. *The Eddy, supra; Richardson, supra; Calcot, supra*, 318 F.2d at 673; *Farrel Lines Inc.* v. *Highlands Ins. Co.*, 696 F.2d 28 (2nd Cir. 1982) at 29. Arrival notice by ordinary mail as the one sent in this case fulfills this requirement.[5]

Conclusion

The Harter Act imposes on carriers a duty of "proper delivery" to the consignee that cannot be contracted away or avoided. Contrary to the Act, the Supreme Court of Puerto Rico, without benefit of analysis, erroneously placed this non-delegable duty on the carrier's shipping agent, Caribe Shipping. However, even if Caribe Shipping were required to make "proper delivery" to the consignee, it did so by sending to the consignee an arrival notice via ordinary mail.

A Writ of Certiorari to review the erroneous judgment of the Supreme Court of the Commonwealth of Puerto Rico must be issued. Petitioner respectfully so requests.

Respectfully submitted,

HARRY ANDUZE MONTANO
117 Eleanor Roosevelt Avenue
Suite 303
Hato Rey, Puerto Rico 00918
Tel. (809) 250-7171

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[5] On at least one occasion has this Court discussed the necessary means to provide proper notice of arrival. In *Constable* v. *National Steamship Co.*, 154 U.S. 51 (1894), the Court, at 63-64, discarded "personal notice" as being inconsistent with the interest for a quick delivery insofar as ". . . such a notice would necessitate a delay of one or two days in the discharge of the cargo, while the notices were being given."

APPENDIX A

CERTIFIED TRANSLATION:

IN THE SUPREME COURT OF PUERTO RICO

No. RE-87-433 Review
Stamped:
APR 26 1991

PEDRO JUAN SOTO, ET AL.,
PLAINTIFFS-APPELLANTS

v.

CARIBE SHIPPING CO., INC.,
DEFENDANT-APPELLEE

Opinion of the Court issued by
Associate Justice, Mister Alonso-Alonso
SAN JUAN, PUERTO RICO, ON 26 APRIL 1991

I

The Soto-Lugo spouses contracted the services of the firm of Fernando Roque, Transportes Internacionales, S.A., to transport from Zaragoza, Spain, to San Juan a trunk that contained personal effects. Among these personal effects were the notations, plans, notes and drafts of three books that were to be written by Mr. Soto. Mr. Soto is a writer. In addition, in said trunk were his notations conducive to obtaining the degree of Doctor of French and Comparative Literature, which were the product of two years of academic research.

On 12 June 1976 the firm of Fernando Roque shipped the aforesaid trunk in Barcelona, Spain, on board the Dutch ship Amersfoort, of the ocean marine carrier line Konynklyke

Nederlandsche Stoomboot-Maalschappi (KNSM). The consignee of said cargo was co-plaintiff Pedro Juan Soto, with address at Q Condominium, Quintana 6013 A, Hato Rey, Puerto Rico 00917.

The trunk arrived at the port of San Juan on 26 July 1976. The stevedoring company for the ship that did the offloading of the merchandise was the defendant-appellee, Caribe Shipping Co., Inc.

The then current regulations provided that after five (5) days had elapsed since the offloading of the merchandise without the consignee claiming it, the same would be transported to and stored in a public warehouse "at the risk and expense of the consignee." See Customs Regulation, 19 U.S.C. Sec. 1490(a); General Order No. MI12957; 19 C.F.R. Sec. 127 et seq. Were it to remain in said warehouse for one year without the consignee claiming it, it would be sold at public auction. 19 U.S.C. Sec. 1491(a).

The merchandise was offloaded at the port and the five (5) days provided by the legislation elapsed without the consignee claiming it. For that reason the Federal Customs Service sent the trunk to a customs duty warehouse located in Miramar. (19 U.S.C. Sec. 1490).

On 19 August 1976, some twenty-four (24) days after the trunk arrived at port, a fire started in a business located in the vicinity of the federal customs warehouse in Miramar. The fire spread to other businesses and it finally reached the warehouse. The fire destroyed the structures of said warehouse, as well as the merchandise stored therein, including Mr. Soto's trunk and its contents.

By the end of July 1976 Mr. Soto had received a letter from Fernando Roque (dated 19 July 1976) notifying him that the trunk with his personal effects had been dispatched to him from Spain with Puerto Rico as its destination. It included the original and copies of the bill of lading. Said document specified the vessel whereon the trunk was shipped (Amersfoort), the port of destination (San Juan, P.R.) and the consignee (Pedro Juan Soto). (Plaintiff's Exhibit 11).

The defendant, Caribe Shipping Co., *was the ship's agent in charge of offloading, stowing, releasing and delivering the cargo.* It had knowledge of the arrival of the Amersfoort at the port of San Juan on 26 July 1976 and made the arrangements for the berthing of the ship and for its offloading. As agent for the ship it generally notified the consignees of the arrival of the merchandise by sending out, through ordinary mail, a copy of the bill of lading with a stamp of "Notice of Arrival."

During the instant trial the individual in charge of sending out the notices expressed that he sent out thousands of notices of arrival, but that he did not have an obligation to do so. He indicated that in this particular case he had notified Soto about the arrival of the trunk by sending him a copy of the bill of lading whereon the stamp of the notice of arrival of cargo had been imprinted, wherein it was indicated that it would arrive on 27 July 1976 and that should it not be picked up on time, it would be sent to a public warehouse approximately on 3 August 1976. He pointed out that the notice was given via ordinary mail three days prior to the arrival of the ship.

However, the trial court *determined that, as a point of fact, Mr. Soto never received the aforesaid document of notice.*

Mr. Soto acquired knowledge that the defendant was the agent in charge of offloading the ship when he wrote to Fernando Roque, on 4 November 1976, concerned because of the delay in receiving the trunk. It is when Mr. Soto communicates with the defendant that for the first time he learned about the fire and the loss of the trunk.

When the plaintiffs learned what had happened, they made the corresponding extrajudicial claims both to Caribe Shipping Co., Inc. and to Fernando Roque Transportes Internacionales S.A. The same resulted fruitless.

Faced with such situation, they filed a complaint for damages against Caribe Shipping Co., Inc. on 20 April 1977. In the same they alleged that the defendant was negligent by failing to notify them of the arrival of the ship that was carrying the trunk at the port of San Juan.

On 28 March 1985, after having held the hearing on negligence, the trial court issued a resolution determining that Caribe Shipping Co., Inc. had incurred a negligence and was liable for the damages caused due to the loss of the trunk. Consequently, it left pending the setting for the hearing on damages.

On 12 November 1985 the trial court held a hearing wherein the parties submitted the Pretrial Conference Report. In that hearing the defendant submitted a motion for summary judgment alleging lack of jurisdiction of the court when it issued its resolution of determination of negligence "because the field of maritime law is occupied by the federal law known as the 'Carriage of Goods by Sea Act,' 46 U.S.C. Sec. 1300 *et seq.* (C.O.G.S.A.)." It alleged in the alternative that no cause of action has been established under Art. 1802 of the Civil Code, 31 L.P.R.A. Sec. 5141.

The plaintiffs presented their opposition to said motion, to which the defendant replied. On 14 July 1987, the trial court, *sua sponte*, decided to reconsider the resolution of 28 March 1985 and to issue judgment dismissing the complaint.

The plaintiffs appeal said judgment before us through a recourse of review. The writ therefor having been issued, the appellants submitted the case based on their initial recourse and the appellee has appeared through its pleadings.

The appellants adduce two (2) points of error. In the first one they charge the trial court with having erred when it resolved that the appellee was not liable for the loss of their trunk. The second error pointed out refers to not having ordered the appellee to pay the fees for the depositions taken of the appellee's experts. We shall discuss the errors pointed out in this same sequence.

II

We will resolve, in the first place, whether the trial court had jurisdiction over the matter or whether, on the contrary,

the controversy should be resolved in the federal forum. When so doing, we will discuss federal laws on admiralty and their application to the controversy at bar. Let us see.

After the Jones Act was promulgated the opportunity arose to make expressions about Admiralty Law applicable to Puerto Rico. The first of these cases was *Lastra* v. *N.Y.P.R.S.S. Co.*, 2 F.2d 812 (1st Cir. 1924) where the Federal Court of Appeals for the District of Puerto Rico established that the provision of the Constitution of the United States on admiralty was not applicable to Puerto Rico unless Congress, through specific legislation, made it applicable. To those effects it expressed:

> "We think that if Congress had intended, by the Organic Act, to extend the admiralty provisions of the Federal Constitution to Puerto Rico, language apt and explicitly expressive of that purpose would have been used; and that language of Sec. 41, granting in general terms the same jurisdiction to the District Court of the United States in Puerto Rico as have the District Courts of the United States does not import an extension of the substantive rights and obligations of our admiralty law to Puerto Rico."

Such rule was reiterated in *Alcoa Steamship Co.* v. *Perez-Rodriguez*, 36 F.2d 35 (1st Cir. 1967) cert. den. 389 U.S. 905 (1967) and *Salas-Mojica* v. *P.R. Litherage*, 492 F.2d 904 (1st Cir. 1974).

In general, the previously cited federal cases dealt with the application of the Workmen's Compensation Act, 11 L.P.R.A. Sec. 1 *et seq.*, in maritime cases. In these cases the Federal Court sustained the application of the local law, even when there existed a Federal Compensation Law.

In *Rhode Island Ins. Co.* v. *Pope & Talbot Lines*, 78 D.P.R. 459 (1955), the parties had contracted services for carriage of goods by sea through a bill of lading. The same established that the Carriage of Goods by the Sea Act (C.O.G.S.A.), 46

U.S.C. Sec. 1300 *et seq.* was the law to be applied to the contract. We resolved therein that the rights and obligations of the parties were governed by the C.O.G.S.A. and we analyzed the evidence in accordance with said Act.

In *Archilla* v. *Smith*, 106 D.P.R. 538 (1977) merchandise was transported by sea from Puerto Rico to Colombia. In that case we expressed that both the C.O.G.S.A. and the *Harter Act*, 46 U.S.C. Secs. 190 to 196, are sources of law applicable in Puerto Rico.

On the other hand, in *Leon* v. *Transconex*, 119 D.P.R. 102, 108 (1987) we resolved that the courts of Puerto Rico *had concurrent jurisdiction* with the federal courts on matters of admiralty under the "saving to suitors" clause of a carriage by sea contract (bill of lading).

We expressed therein that:

> "The 'saving to suitors' clause, addressed to grant jurisdiction to state and federal courts . . . applies in like manner in Puerto Rico." On page 109.

The case at bar being an action related to the contract for maritime transportation and to the claim on damages for the loss of merchandise so transported, it results crystal clear that the trial court *did have concurrent jurisdiction* to entertain in the controversy herein before us. Also see Longley, *Common Carriage of Cargo*, Matthew Bender, N.Y. 1967, Sec. 22.01.

III

Having determined the concurrent jurisdiction of the trial court over the controversy, we must determine the federal or local legislation applicable to the same. See *Leon* v. *Transconex*, *supra*, Note No. 11. In particular, two federal laws that are intimately related to each other but with different effects gain relevance. These are the Harter Act, 46 U.S.C. Secs. 190 to 196, and the Carriage of Goods by the Sea Act

(C.O.G.S.A.), 46 U.S.C. Sec. 1300 *et seq.*, both extensive to Puerto Rico by virtue of Sec. 8 of the Federal Relations Act, 1 L.P.R.A.; *Archilla* v. *Smith*, *supra*.

Let us briefly examine the background and scope of both Acts. In 1893 the Congress of the United States passed the Harter Act in an attempt to achieve a balance of interests between ocean marine carriers, merchants and owners of merchandise that used the ships to transport the same. The Act was intended to prohibit the practice of ocean marine carriers of including in bills of lading or other shipping documents clauses geared to relieving them of any liability, even that derived from their guilt or negligence when carrying, safeguarding or delivering the merchandise. However, it was recognized for the carrier that whenever there intervened an error of navigation after having displayed due diligence, or whenever the damage occurred when attempting to save lives or property at sea, he was released from liability. See Gilmore & Black, *The Law of Admiralty*, 2nd Ed., The Foundation Press, Inc., N.Y. 1975, page 119 *et seq.*; Villareal, Dewey, *Carriers' Responsibility to Cargo and Cargo's to Carrier*, 45 Tulane Law Rev. 770, 773 (1971).

In order to achieve this accommodation of interests several provisions were included in said law for the purpose of standardizing the shipment contracts. *Encyclopedia Britannica* v. *C.S. Hong Kong Producers*, 422 F.2d 7 (2nd Cir. 1969).

Said law was made applicable both to domestic and to international ocean marine trade. See M. Bayard, *The Ocean Bill of Lading: A Study in Fossilization*, 45 Tulane Law Rev. 697, 711 (1971). The coverage of the Harter Act is wide and it regulates the rights and obligations of the parties from the time the *goods are loaded* until their *offloading, warehousing and delivery*. The Harter Act then covers those events subsequent to the discharge of the merchandise. *Archilla* v. *Smith*, *supra*, pgs. 543-544; 46 U.S.C. Sec. 190; *The Monte Iciar*, 167 F.2d 334 (3rd Cir. 1948); *Levantino Co.* v. *M.S. Helving Form*, 1968 A.M.C. 2263 (S.D.N.Y. 1968); Fetley, William, *Marine*

Cargo Claims, Third Ed., International Shipping Publications, 1988, pg. 771-772. Thus, in *Allied Chemical* v. *Companhia de Navegacao*, 775 F.2d 876 (2nd Cir. 1985) the United States Court of Appeals for the Second Circuit expressed about said law:

> "Although the enactment of C.O.G.S.A. sharply curtailed the applicability of the Harter Act ... to ocean bills of lading and matters of ocean carriers liability, absent a valid agreement to the contrary, the Harter Act still governs prior to loading *and after discharge of cargo until proper delivery is made.*" (Emphasis added). On page 482.

In *Caterpillar Overseas* v. *S.S. Expeditor*, 318 F.2d 720 (2nd Cir. 1963) it was also resolved, in relation to the Harter Act, that:

> "COGSA's coverage, however, extends only to the period, in foreign commerce, from the time the goods are loaded to the time when they are discharged from the ship. Harter remains applicable, therefore, to the period between the discharge of cargo from the vessel *and its proper delivery.*" (Emphasis added). On page 723.

In 1936 Congress passed the Carriage of Goods by Sea Act (C.O.G.S.A.) following the standards adopted in the Brussels Convention of 1924.

From its own terms, C.O.G.S.A. applies only to maritime foreign trade. However, the Act itself allows the parties to agree restrictively in the bill of lading to resort to said law even when it is local maritime trade. *Rhode Island Ins. Co.* v. *Pope & Talbot Lines*, 78 D.P.R. 454 (1955); *Archilla* v. *Smith*, *supra*; *Insurance Co.* v. *P.R. Marine Management*, 599 F.Supp. 199 (D.P.R. 1984); *Home Ins. Co.* v. *P.R. Maritime Shipping Authority*, 524 F.Supp. 541 (D.P.R. 1981); *Com-*

monwealth v. *S.S. Puerto Rico*, 455 F.Supp. 310 (D.Md. 1978).

Contrary to the Harter Act, the provisions of C.O.G.S.A. have a limited coverage as to the period of maritime transport. By its terms it is limited to regulate the rights and obligations between the consignee and the carrier or its agent *during the floating tract*, 46 U.S.C. Sec. 1301. This is from the time that the goods are loaded onto the vessel until they are discharged at the port. See *Archilla* v. *Smith*, *supra*, pg. 542; *Rhode Island* v. *Pope*, *supra*, pg. 464; Longley, *Common Carriage of Cargo*, Matthew Bender, N.Y. 1967, Secs. 1.06 and 11.01; Wharton Poor, *Poor on Charter Parties and Ocean Bills of Lading*, 5th Ed., Matthew Bender, N.Y. 1968, Sec. 61; Gilmore & Black, Op. Cit., pg. 147.

IV

In addition to the *Harter Act* and *C.O.G.S.A.*, the shipping agent's duties also arise from the carriage contract and from the functions inherent to his charge, which make him responsible for stowing, dispatching and delivering the cargo diligently.

Nevertheless, the carrier or his agent may not, through the shipping contract, be released from liability for damages derived from their own guilt when loading, exercising custody over, or *delivering the merchandise*. In regard to Secs. 190-195 of the Harter Act that deal with the period after the merchandise has been offloaded, the following has been said:

> "... it was clearly the intention of Section 1 of the Harter Act to declare invalid those clauses which undertake to relieve carrier of its obligation to exercise *due diligence* to make proper delivery of the cargo." (Emphasis added). *Levantino* v. *American President*, 233 F.Supp. 697 (1964).

However, it has been recognized that the carrier and the consignee may agree on the bill of lading to extend the defenses and limitations of liability consigned in C.O.G.S.A. to the stevedores or agents. *Grace Line Inc.* v. *Todd Shipyards Corp.*, 500 F.2d 361 (9th Cir. 1974). This type of clause, contractually limiting liability under C.O.G.S.A., is commonly known as the "Himalaya Clause." The validity of said clause has been recognized by the courts. In that regard, Fetley, *supra*, states that:

> "Today the Himalaya Clause benefitting the stevedore and the terminal operator is valid in the United States in virtue of *Herd* v. *Krawell.*"

However, said clause can not establish an *absolute immunity* from liability, but merely limited. On that particular the United States Court of Appeals for the Ninth Circuit, when discussing the difference between a limitation of liability and exemption from the same, has stated in relation to this type of clause that:

> "It is the holding of this court that a contract, no matter how clear and express, which purports *wholly to immunize* a non-carrier from liability for its negligence, is repugnant to traditional law and sound policy.
>
> . . . This distinction between a limitation on liability and an exemption from liability is crucial. A limitation, unlike an exemption, does not induce negligence." *Grace Line Inc.* v. *Todd*, *supra*, pg. 373. (Emphasis added).

The carrier or its agent can not be contractually immunized from the liability that arises from their negligent acts.

In the case at bar, although it has to do with carriage of merchandise from a foreign country, C.O.G.S.A. is *not* applicable because the loss occurred *after the merchandise was offloaded and taken to a warehouse*. In addition, a detailed

examination of the bill of lading reflects that the parties did not incorporate the provisions of C.O.G.S.A. for the same to govern the rights and obligations of the parties during the period subsequent to the offloading. 46 U.S.C. Sec. 1307; *Archilla* v. *Smith*, *supra*.[1]

VI

Neither is the local law applicable to the case at bar, particularly Art. 1802 of the Civil Code, 31 L.P.R.A. Sec. 5141. This is not a proper case wherein the local courts may put into effect state legislation that is not in contravention with the principles of federal admiralty law. *Leon* v. *Transconex*, *supra*. This has to do with a claim for damages suffered because of the alleged breach of a contractual obligation of the ocean marine shipping contract whose genesis stems from the duty imposed on the stevedore by the authority conferred by legislation in the federal laws on admiralty, the Harter Act in this particular case.

We have already seen that the Harter Act provides that the carrier's liability for the merchandise does not end when the merchandise is offloaded; the same extends until a "proper delivery" occurs.[2]

We must resolve whether "proper delivery" was made in the case before us, in order to be able to determine the liability of the parties in the light of said federal law.

In *Kinderman & Sons* v. *Nippon Yussen Kaisha Lines*, 322 F.Supp. 939, 941 (E.D.P. 1971), the Federal District Court

[1] In the shipping contract at bar the only thing that was limited was the carrier's or his agent's liability to 1,250 florins per bundle. Such limitation is considered valid provided always that at the moment of the execution of the contract said agreed-upon amount is not less than the $500.00 dollars per bundle that are imposed as a limitation by the C.O.G.S.A., 46 U.S.C. Sec. 1304 (15). Should said amount in florins result in less than $500.00 dollars, the limitation would be null because it would be in contravention of the law.

[2] The Harter Act does not define the concept of "proper delivery." The same has been interpreted case-by-case by the courts.

for Pennsylvania was faced with the controversy of whether or not the "proper delivery" required by the law had taken place. On that particular it expressed the following:

> "The carrier may discharge the goods onto a fit and customary wharf *provided due and reasonable notice is given [and] a fair opportunity to remove the goods or place them under proper care [or] custody.*" (Emphasis added).

In *Kinderman* the court resolved, as a point of fact, that the consignee had been notified of the arrival of the merchandise and that the same was available to him for disposal on 8 June 1965. On 15 June of the same year there occurred a fire wherein the merchandise was lost. The Court understood that delivery pursuant to the Harter Act had been made, since the consignee *was duly notified* and had the opportunity to retrieve the merchandise from the warehouse. The Court pointed out:

> "As defendant made a proper delivery of the cargo to the plaintiff, the risk of loss passed to the plaintiff for any loss not occasioned by negligence on the part of the defendant. The burden of proof of such negligence is on plaintiff, as once there has been a proper delivery of the cargo, the Harter Act no longer applies to the relationship of the parties." On page 942.

In *Orient Overseas* v. *Globemaster*, 365 A.2d 325 (Md. App. 1977), the Maryland Special Court of Appeals distinguished two situations within the concept of "proper delivery:"

> ". . . 'Proper delivery' within the provisions of this act (Harter Act) means either *actual* or *constructive* delivery. '*Actual delivery*' consists in *completely transferring possession and control* of goods from the vessel *to the*

> *consignee* or his agent while *'constructive delivery'* occurs when the goods are discharged from the ship on a fit wharf and the *consignee receives due and reasonable notice that the goods have been discharged* and has *a reasonable opportunity to remove the goods* or put them under proper care and custody." Page 335. (Parenthesis and emphasis added).

In the case at bar the trial court, as a point of fact, determined that Mr. Soto *did not receive notice of the arrival of his merchandise*. The defendant presented the testimony of the individual in charge of sending out the notices of arrival of merchandise, Mr. Fernando Santiago Seijo, to the effects that he sent out the notice among the thousands that he used to send out via ordinary mail. He also sustained that there was no obligation to give such notice. In addition, an alleged copy of the notice sent to Soto was presented. The trial court, however, never believed[3] that the alleged copy of the notice was sent to Mr. Soto. It so arises from its resolution of 22 [sic] March 1985, wherein it pointed out:

> "It was the duty of Caribe Shipping to notify the consignee as to when and where would the merchandise be received, so that he would be able to go and pick up the same. *The testimonial evidence presented about the sending out of the notice was unable to establish, in our judgment, that said notice was given diligently nor that there was any interest in the consignee receiving the same. Neither was it shown that it was done in accordance with what has been stated herein, in the sense that the notice should have been sent once the ship was ready to offload. On the contrary, it was alleged that the defendant had no*

[3] It is not for this forum to pass judgment on the credibility that any given witness deserved before the trial court and determine whether in this case the notice was indeed sent out or not, in the absence of passion, prejudice, partiality or manifest error. *A.E.E.* v. *Las Americas Trust Co.*, op. of 16 June 1989, 89 JTS 56; *Torres-Ortiz* v. *Pla*, op. of 9 May 1989, 89 JTS 46.

> *obligation to give such notice; nevertheless, they point out that they are the people in charge of sending out such notices and that in fact they have sent out thousands of them.*" (Emphasis added).

When the court reconsidered its Resolution of 28 March 1985, through its Judgment of 14 July 1987 it *ratified* its finding of fact of the former to the effects that in point of fact Mr. Soto never received any notice whatsoever from Caribe Shipping Co., Inc. To those effects it expressed the following in paragraph 10 of its Judgment:

> "10. Mr. Pedro Juan Soto, as a *matter of fact, never received the noticing document described in the preceding paragraph.*" (Emphasis added).

When it changed the reason for its ruling in said Judgment, to the effects that the fire was fortuitous and that Caribe Shipping Co., Inc., by sending the trunk to the warehouse was not the proximate cause of the damage caused, the Court did not consider the legal doctrines about actual or constructive delivery.[4]

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[4] We disagree with the analysis that our colleague, Associate Justice Mr. Negron-Garcia, does in his dissenting opinion about said Judgment.

We likewise disagree with his position sustaining that Mr. Soto stipulated in Exhibit A and in Exhibit XI the notice supposedly given by *Caribe Shipping Co., Inc.*

Exhibit A, stipulated by the parties, was *a photocopy of the bill of lading* sent by Fernando Roque, the carrier. The supposed notice sent by Caribe Shipping Co., Inc. *was never* stipulated. It so arises from the minutes of 30 January 1979 (Original Case File, page 39), which literally reads as follows:

"Exhibit A — for both parties, Photocopy of the bill of lading, sent by Fernando Roque to Mr. Pedro Juan Soto."

Furthermore, from the aforesaid minutes it arises that the following was stipulated as Exhibit XI:

"*Letter* dated 19 July 1976, with bills of lading attached."

Said letter dated 19 July 1976 is from Fernando Roque to Mr. Pedro Juan Soto informing him that the trunk and personal effects were dispatched from customs in Spain and reissued for their final destination in Puerto Rico and

In addition, *the proof that the trial court had before it rebutted the presumption* established by Rule 16 (24) of the Rules of Evidence to the effects that a letter duly addressed and sent by mail was timely received. *Hawayek* v. *P.R. Water Resources Authority*, res. on 29 May 1989, 89 J.T.S. 36.

Consequently, we conclude that in this case there was neither *actual* nor *constructive* delivery of the merchandise. Mr. Soto had neither possession nor physical control of his goods and neither did he receive due notice that his merchandise had arrived, so that he could have a reasonable opportunity to pick it up. See Watkins, *Shippers and Carriers*, 5th Ed. Fuller, Sec. 2-25; 2B *Benedict on Admiralty*, Sec. 33; Poor, *supra*, Sec. 61; *General Refrigerator Corp.* v. *Acme Fast Freight*, 60 N.Y.S. 2d 370 (1975).

Until "proper delivery" is made, the Harter Act holds the carrier liable for *contractual* damages caused by the loss of the merchandise. See James B. Doak, *Liabilities of Stevedores, Terminal Operators and Other Handlers in Relation to Cargo*, Tulane Law Rev. 752 (1970-71).

Wherefore, we resolve that Caribe Shipping Co., Inc. is liable for the damages caused to Mr. Soto as a consequence of the loss of his merchandise.[5]

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supposedly enclosing for him 2 originals and 2 copies of the bill of lading as the same was issued at the port of embarkation. In the case file was placed only a copy marked as original with a stamp and another copy marked with a stamp as "Copy non negotiable." *None of said copies is a notice from Caribe Shipping Co., Inc.* that the merchandise had been received in Puerto Rico.

We can not interpret that the notice from *Caribe Shipping Co., Inc.* was stipulated when, during the entire litigation that started on 20 April 1977 — *14 years ago* — the parties and the Court itself *a quo* have always considered the matter of the notice as one of most importance in the controversy, litigating it and arguing it extensively, even before this forum. It would imply charging the trial court and the parties with an exercise in futility.

[5] It is not an onerous rule, but indeed one of justice for consignees of maritime merchandise received in Puerto Rico, for the carriers or their agents to adequately notify them in writing about the receipt of their merchandise at port.

VII

The second error was made. The trial court should have imposed on the appellee the payment of fees for the appellant's experts that the former called to depose. Rule 23.1 of Civil Procedure, 32 L.P.R.A. App. III.

When the taking of the deposition of the appellee's experts took place, they announced that their rate would be five hundred dollars ($500). The appellant expressed that it would leave to the discretion of the court the fixing of the fees for the experts' appearance. The trial court did not provide anything at all on this subject.

The appellee objected to the amount claimed by the experts because it considered it excessive. In its pleadings in opposition to the petition for review, it accepted that of the eight hundred and thirty dollars ($830) claimed as expert's fees the court should approve four hundred and fifteen dollars ($415) at the most. Its position is that the appellant is entitled to only five hundred dollars ($500) in its claim, pursuant to the provisions of C.O.G.S.A. (46 U.S.C. Sec. 1304) and that if eight hundred and thirty dollars ($830) were granted as expert's fees, there would be a grant for said concept in excess of the entitlement for the claim.

This has to do with the intermediate experts, entitled to additional fees. *San Lorenzo Trading* v. *Hernandez*, 114 D.P.R. 704, 718 (1983). The expert, Professor Emilio Diaz-Valcarcel, is an author of novels and collections of short stories from the Metropolitan University of Cupey. The expert, Mr. Francisco Manual Vazquez-Lopez, is the editor, president of Editorial Cultural, Inc. and manager of Editorial Cultural and its subsidiary, Editorial Antillana, Inc.

Prof. Valcarcel informed the defendant that the value of his appearance was five hundred dollars ($500), the minimum that he charged for a conference, for his preparation for those effects and for his examination of the transcript of the case. Editor Vazquez billed three hundred and thirty dollars ($330)

for the time invested to find the documents that the defendant party required of him in its summons, for the appearance itself and for the examination of the transcript of the case. (5½ hours at the rate of sixty dollars ($60) per hour).

The appellee having been advised of the amount of the fees and the intermediate expert being entitled to the payment of additional fees by whoever calls him to depose, we conclude that the amount claimed for this concept does not result excessive. The appellee is ordered to pay said fees. Indemnity for such concept is independent from the claimant's cause of action in this case. This does not have to do with collection of expert's fees as costs. Cf. *Melendez* v. *Levitt & Sons*, 104 D.P.R. 707, 810-811 (1976); *Toppel* v. *Toppel*, 114 D.P.R. 16, 20-22.

On the grounds stated, judgment will be entered revoking that of the trial forum and remanding the case for damages to be adjudged pursuant to the rulings of this recourse and ordering the appellee to pay the fees of the experts whose depositions were taken.

/SGD/ (UNREADABLE)
RAFAEL ALONSO-ALONSO
Associate Justice

— CERTIFIED —
To be a correct translation prepared by:

ERNESTO QUIDGLEY
U.S. Certified Court Interpreter
(P.L. 95-539, 28 USC 1827)

9-28-91

APPENDIX B

CERTIFIED TRANSLATION:

IN THE SUPREME COURT OF PUERTO RICO

No. RE-87-433 Review

PEDRO JUAN SOTO, ET AL.,
PLAINTIFFS-APPELLANTS

v.

CARIBE SHIPPING CO., INC.,
DEFENDANT-APPELLEE

JUDGMENT

SAN JUAN, PUERTO RICO, ON 26 APRIL 1991

On the grounds stated in the foregoing opinion, which is made an integral part hereof, judgment is issued and that of the trial court is revoked and the case is remanded for said forum to adjudge the damages in accordance with the foregoing ruling. It is further ordered that the appellee is to pay the fees of the experts whose depositions it took.

It was so pronounced and ordered by the Court and the General Clerk so certifies. Associate Justice Mr. Negron-Garcia dissents with a written opinion. Associate Justice Mr. Rebollo-Lopez dissents without a written opinion.

/SGD/(UNREADABLE)
FRANCISCO R. AGRAIT-LLADO
General Clerk

NOTIFIED ON:
26 April 1991
By: / INITIALS / (UNREADABLE)

— CERTIFIED —
To be a correct translation prepared by:

ERNESTO QUIDGLEY
U.S. Certified Court Interpreter
(P.L. 95-539, 28 USC 1827)

232 Upsala Street, College Park
Rio Piedras, Puerto Rico 00921
(809) 751-8334

APPENDIX C

CERTIFIED TRANSLATION:
9-30-91

IN THE SUPREME COURT OF PUERTO RICO

No. RE-87-433 Review
(Stamped):
APR 26 1991

PEDRO JUAN SOTO, ET AL.,
PLAINTIFFS-APPELLANTS

v.

CARIBE SHIPPING CO., INC.,
DEFENDANT-APPELLEE

Dissenting Opinion of Associate Justice Mr. Negron-Garcia
SAN JUAN, PUERTO RICO, ON 26 APRIL 1991.

In a court composed of several Justices it is natural to often have plural opinions as an unavoidable result of the differences in the individual thinking of its members. It is needless to say that the intrinsic and persuasive validity of the institutional ruling — or dissent — will depend not only on the soundness of the foundations and the study of doctrine but also on the correct appreciation and exposition of the facts.

With this perspective in mind, let us *precisely state* the facts before us.

I

In mid-1976 Mr. Pedro Juan Soto contracted in Barcelona, Spain, with shipping agent Fernando Roque Transportes Internacionales, S.A. *(Fernando Roque)* for the transportation

of a trunk with personal effects from Zaragoza to the port of San Juan. He recorded himself as the consignee, with address at Condominium Q, Quintana, 6013-A, Hato Rey, Puerto Rico 00917.

On 12 July 1976 *Fernando Roque* shipped the trunk in the vessel AMERSFOORT, of the Dutch line Koninklyke Nederlandsche Stoomboot-Maalschappi *(KNSM)*. In a letter dated 19 July 1976 it so notified Mr. Soto and *sent him the original and a copy of the bill of lading*. These documents were marked as Plaintiffs' Exhibit XI. Mr. Soto received them at the end of that month.

On or about 23 July, Caribe Shipping Co., Inc. *(Caribe Shipping)*, *local* shipping agent for the KNSM firm, *sent to Mr. Soto a copy of the bill of lading stamped with a "Notice of Arrival."* In the *imprinted stamp* it was indicated that the cargo would arrive in Puerto Rico on 27 July and he was warned that should it not be retrieved by 3 August 1976, it would be sent to a public warehouse for customs duties. According to the testimony of the person in charge of giving these notices, this was done via ordinary mail, as was the custom with all notices of arrival. A *photocopy of this document, with said notice, was presented as evidence at trial and identified as Joint Exhibit A. Minutes of 30 January 1979 (A.O. 39).*

As testified by Mr. Soto himself, he did not receive this notice. It was so determined by the trial court.

On 26 July 1976 the vessel AMERSFOORT arrived at San Juan, where Caribe Shipping performed the offloading operation. Since five (5) days did elapse from its arrival without the trunk being claimed, the Federal Customs Service sent it to a customs duty warehouse located in the Miramar area. This was done in accordance with the federal customs legislation and regulations. 19 U.S.C. Secs. 1490(a) et seq.; 19 C.F.R. Secs. 127 et seq. As a consequence, Caribe Shipping lost, *by operation of law, the juridical possession and physical control of the trunk.*

Subsequently, on 19 August 1976 a fire spread to said warehouse and destroyed the trunk and its contents. Mr. Soto found out on 4 November, when concerned about the time that had elapsed, he wrote to the firm of Fernando Roque inquiring about the status of the shipment. Afterwards he claimed from Caribe Shipping and Fernando Roque. When those efforts resulted fruitless, on 20 April 1977 Mr. Soto and his wife, Mrs. Carmen Lugo-Filippi, interposed before the Superior Court, San Juan Section, the instant action against Caribe Shipping.

Initially said court (the Hon. Juan A. Arill-Miranda, Judge) imposed liability but subsequently, by way of reconsideration, dismissed the complaint. In disagreement, they appealed.

II

We can not subscribe the majority opinion that, although it describes certain pertinent standards of law, *erroneously* imposes liability on Caribe Shipping. They are based on that "the trial court *never believed* that the alleged notifying copy was sent to Mr. Soto." (Page 15 [of the Spanish; page 17 of the Translation]). THIS SO CRUCIAL ASSERTION OF THE MAJORITY Is INCORRECT.

First, as stated, *both parties* submitted *Exhibit A* as evidence; this is a *photocopy* of the *bill of lading with the stamp of the notice of arrival of the trunk that was sent to Mr. Soto via ordinary mail.* Its mailing was the object of the *incontroverted* testimony of Mr. Fernando Santiago Seijo, employee of Caribe Shipping in charge of that task. How can we refuse real and total value to that evidence? Why limit it and exclude the notice that arises from its face?

Apparently the majority refuses to recognize that this document — although according to the minutes is a "photocopy of the *bill of lading* sent by Fernando Roque to Mr. Pedro Juan Soto" — was *stipulated* by *both parties* (Exh. A) and is distinguished from any other precisely because of the *stamp* of *notice* to Mr. Soto, *stamped* by *Caribe Shipping.* It is a serious

error to think that it is simply the *bill of lading sent directly* by Fernando Roque to Mr. Soto. We repeat, the majority has not taken into account that important *difference* between Exh. A for *both parties* and Plaintiff's Exh. XI. The latter does represent the *original* and a *copy* of that *bill of lading*, of course, *without* the stamp with the notice of Mr. Soto.

The majority's reluctance to adjudge the true value to that document resides in that confusion. Perhaps this explains the *unexpressed* premise of the majority, to wit, that Caribe Shipping had to use a *different* document to give the notice and it could not utilize a copy of the *bill of lading with the imprinted stamp advising Mr. Soto of the arrival of the ship*. We do not know of any legal provision whatsoever that imposes such requirement, foreign to a practice that has been effective in thousands of cases of this important industry.

And *second*, the majority fragily rests on a Resolution of 28 May [sic] 1985 to sustain that the trial court did not believe that Caribe Shipping notified Mr. Soto. When so doing, it *overlooks* that said ruling was *subsequently reconsidered* by said forum in its Judgment of 14 July 1987, wherein it *denied* the complaint. On this last occasion, in that regard it *only* reaffirmed:

> "9. The defendant alleges that it notified the plaintiff about the arrival of the trunk by mailing to him via ordinary mail three days prior to the arrival of the ship a copy of the bill of lading whereon a stamp called 'Notice of arrival of cargo' had been imprinted, that indicated that the cargo would arrive on 27 July 1976 and that 'if it is not picked up on time, this cargo will be sent to a public warehouse approximately on Aug. 3, 1976.' *This procedure was the one that the defendant party habitually used to notify consignees of the arrival of merchandise destined for them*.
>
> 10. Mr. Pedro Juan Soto, as a matter of fact, *never received* the noticing document described in the preceding paragraph." (Emphasis added).

OUTSIDE OF THESE EXPRESSIONS, In The Judgment THERE Is NO OTHER FINDING Of Fact That Supports The Conclusion Of The Majority. From the reading of the transcribed paragraph 9 it arises that, as a matter of reality, the trial court *recognized the noticing procedure* that Caribe Shipping always followed. Different from the majority's conclusion, it did not adjudge — *it did not even mention* — any extreme regarding the credibility of the proof of noticing. This silence eloquently contrasts with the thirteen (13) earlier findings of fact that it *restrictively* and *"in detail reaffirmed"* in its judgment.

And it is that when reiterating some findings of fact and *rejecting others*, the trial court acted by virtue of the faculty granted to it by the rules of procedure. It could even alter them. *Rosario Crespo* v. *A.F.F.*, 94 D.P.R. 834, 846 (1967). It is so much so that it said: "The determination of whether *the defendant (Caribe Shipping) did or did not notify the arrival of the trunk* is one that for the effects of the conclusions of law *does not* contribute any substantial element whatsoever."

This wording — "whether the defendant *did or did not notify* the arrival of the trunk" — is very far from and clashes head on with the majority's posture. The trial court's approach is perfectly *understandable*. It could not refuse to recognize what arose clearly from the stamp imprinted on Exh. A for *both parties:* a copy of the notice of arrival sent to Mr. Soto via ordinary mail.

The error in the thesis of the majority resides in intermixing and treating — *as though they were equal acts* — the *notice sent* by *Caribe Shipping* and the circumstance that it was *not received* by Mr. Soto.

Evidently the determination of the majority that the trial court "never believed that the alleged notice was sent to Mr. Soto" is A SPECULATION THAT RESULTS INCOMPATIBLE WITH THE JUDGMENT. IN ADDITION, IT IS CONTRARY TO THE STIPULATED DOCUMENTARY EVIDENCE AND THE INCONTROVERTED TESTIMONIAL EVIDENCE PRESENTED. In this aspect, it is a *contradiction* that in footnote 5 [sic] the majority invokes

the rule of not "passing judgment on the credibility that any given witness deserved before the trial court," *to do the opposite, namely, to attribute to the judge certain adjudications of credibility that he did not make.*

III

We can not then charge Caribe Shipping with lack of diligence. The Reason Is Clear: IT WAS PROVEN THAT IT SENT THE LETTER. The only thing destroyed was the presumption consecrated in Rule 16 (24) of Evidence that the notice was duly and timely *received*, but the fact that *it was sent to Mr. Soto* subsisted. See *Diaz de Diana* v. *A.J.A.S. Ins. Co.*, 110 D.P.R. 471, 477-478 (1980).

The majority opinion forgets that this "presumption is based on the fact that the post office is a public agency charged by law with the duty of transmitting and delivering the mail, as well as that, as a general rule, the correspondence is timely delivered . . ." (Translation ours). Jones, *The Law of Evidence*, Chap. 3, 3:41, page 203.

If the government's postal machinery is late or fails to deliver, what greater diligence can be required from the shipping agent who by provision of law has some cargo under his possession and control only for the *short* period of five (5) days? Is it that notice via ordinary mail is not sufficient? Is it that a *photocopy* of the stamped document (stipulated by *both* parties) and the incontroverted testimony of the employee Santiago Seijo are not sufficient proof? Can the majority be requiring, *sub silentio*, a *more formal* notification? If so, must it be via certified mail? Given personally?

Before these alternatives, is the period of five (5) days sufficient? Likewise, should we impose on the agent the obligation to visit the customs duty warehouse to find out what cargo has been really claimed by the consignees?

IV

The prevailing doctrine recognizes that the carrier's liability, and therefore, the shipping agent's, *ends* when proper delivery of the cargo has been accomplished, be it *actual* or *constructive*. A judicial determination that there has been a *constructive* delivery implies an examination of the uses and customs of the port of arrival, the efforts made by the shipping agent to accomplish an actual delivery, *the diligence shown by the consignee* and finally, the applicable legislation and regulations.

In the case before us, Caribe Shipping could not have been required to send out *subsequent* notices. THE TRUNK WAS NOT UNDER ITS CUSTODY OR CONTROL, BUT IN A WAREHOUSE ASSIGNED BY THE FEDERAL CUSTOMS SERVICE. FURTHERMORE, CARIBE SHIPPING DID NOT KNOW THE STATUS OF ITS DELIVERY.

V

Lastly, as an *additional foundation*, it is proper to point out that it was not until more than three (3) months had elapsed since its arrival at the port of San Juan that Mr. Soto began to inquire about the trunk. According to the evidence presented, this was not the first time that he had sent something from Spain. Since the end of July Mr. Soto *had been advised* that the trunk *was en route*. He also knew the name of the ship and its destination. In these circumstances, *his efforts were Belated And Unjustified*.

IN SUMMARY, THE EVIDENCE SHOWS THAT CARIBE SHIPPING COMPLIED WITH THE DUTY TO NOTIFY AND, IN ADDITION, IT MADE A CONSTRUCTIVE DELIVERY OF THE TRUNK. IT THEREBY COMPLETELY SEVERED ITSELF FROM THE CONTRACTUAL RELATIONSHIP THAT BOUND IT TO MR. SOTO. THE LACK OF DILIGENCE OF MR. SOTO DISPROPORTIONATELY CONTRASTS WITH THE LIABILITY OF AN ABSOLUTE NATURE IMPOSED BY THIS COURT ON CARIBE SHIPPING.

We would confirm the judgment.

/SGD/ (UNREADABLE)
ANTONIO S. NEGRON-GARCIA
Associate Justice

— CERTIFIED —
To be a correct translation prepared by:

ERNESTO QUIDGLEY
U.S. Certified Court Interpreter
(P.L. 95-539, 28 USC 1827)

232 Upsala Street, College Park
Rio Piedras, Puerto Rico 00921
(809) 751-8334

9-30-91

APPENDIX D

CERTIFIED TRANSLATION:

IN THE SUPREME COURT OF PUERTO RICO

No. RE-87-433 Review
(Stamped):
JUL 9 1991

PEDRO JUAN SOTO AND HIS WIFE,
MRS. CARMEN LUGO-FILIPPI,
PLAINTIFFS-APPELLANTS

v.

CARIBE SHIPPING COMPANY, INC.,
DEFENDANT-APPELLEE

RESOLUTION
SAN JUAN, PUERTO RICO, ON 28 JUNE 1991.

As to the motion for reconsideration of the appellee, Caribe Shipping Company, Inc., it is denied.

It was so agreed by the Court and is so certified by its Deputy Clerk. Associate Justices Messrs. Negron-Garcia and Rebollo-Lopez would reconsider.

/SGD/ (UNREADABLE)
HERIBERTO PEREZ-RUIZ
Deputy Clerk

(Stamped):
NOTIFIED ON:
8 July 1991
By: / INITIALS / (UNREADABLE)

— CERTIFIED —
To be a correct translation prepared by:

ERNESTO QUIDGLEY
U.S. Certified Court Interpreter
(P.L. 95-539, 28 USC 1827)

232 Upsala Street, College Park
Rio Piedras, Puerto Rico 00921
(809) 751-8334

9-30-91

APPENDIX E

CERTIFIED TRANSLATION:
9-30-91

IN THE SUPREME COURT OF PUERTO RICO

No. RE-87-433 Review
(Stamped):
AUG 7 1991

PEDRO JUAN SOTO, ET AL.,
PLAINTIFFS-APPELLANTS

v.

CARIBE SHIPPING CO., INC.,
DEFENDANT-APPELLEE

COURT COMPOSED BY ITS PRESIDENT, ASSOCIATE JUSTICE MR. REBOLLO-LOPEZ, ASSOCIATE JUSTICE MRS. NAVEIRA DE RODON AND ASSOCIATE JUSTICE MR. ANDREU-GARCIA.

RESOLUTION
San Juan, Puerto Rico, on 2 August 1991.

As to the second motion for reconsideration, it is denied. Abide by what has been resolved.

It was so agreed by the Court and is so certified by its General Clerk. Associate Justice Mr. Rebollo-Lopez would reconsider.

/SGD/ (UNREADABLE)
FRANCISCO R. AGRAIT-LLADO
General Clerk

(Stamped):
NOTIFIED ON:
5 August 1991
By: / INITIALS / (UNREADABLE)

— CERTIFIED —
TO BE A CORRECT TRANSLATION PREPARED BY:

ERNESTO QUIDGLEY
U.S. Certified Court Interpreter
(P.L. 95-539, 28 USC 1827)

9-30-91

APPENDIX F

CERTIFIED TRANSLATION:
9-27-91

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN SECTION

Civil No.: 77-2639
On:
Damages

PEDRO JUAN SOTO AND HIS WIFE
MRS. CARMEN LUGO-FILIPPI,
PLAINTIFFS

v.

CARIBE SHIPPING COMPANY, INC.,
DEFENDANTS

R-E-S-O-L-U-T-I-O-N

This is a claim that arises as a consequence of the loss of a trunk belonging to the plaintiffs, Mr. Pedro Juan Soto and his wife Mrs. Carmen Lugo Filippi. This trunk had been sent on 12 July 1976 from the city of Zaragoza, Spain, with San Juan, Puerto Rico as its destination.

The plaintiffs allege that the defendant incurred in negligence when it failed to notify them, the owners and consignee of the trunk, of the arrival at port of the ship wherein the cargo was transported. Because the trunk was not claimed, the same was deposited in a public warehouse, property of a third party, where it was destroyed by a fire.

The defendant adduces that it notified the plaintiff with a copy of the bill of lading about the date of arrival of the ship

at the port of San Juan, the date when the merchandise would be put in storage by provision of the customs law and that therefore the applicable statutes and the bill of lading exempt it from liability.

The parties agreed, with the acquiescence of the Court, to present only the proof on negligence. Therefore, the decision of the Court will be limited to determining whether in accordance with the circumstances of the instant case the defendant incurred in any type of negligence that imposes on it the obligation to answer for the loss of the trunk. If the ruling is in the affirmative, judicial proceedings will continue later on for the disposition of the aspect of the damages suffered by the plaintiffs.

On 30 January 1979, after the required procedural actions, a hearing on the case was held wherein the parties presented their testimonial and documentary evidence. The Court requested simultaneous memorandums of law from both parties, to be filed within forty-five (45) days after the hearing. On 19 March 1979 the plaintiff party filed a Memorandum of Authorities in support of its position. The defendants did not file any memorandum whatsoever.

Having analyzed and weighed as a whole the evidence presented by the parties and adjudged the credibility that the witnesses deserved before it because of the form and manner in which they testified, the Court formulates the following:

FINDINGS OF FACT

1. The plaintiff party contracted the services of the firm Fernando Roque Transportes Internacionales, S.A., shipping agent, for the transportation of a trunk that contained personal effects from Zaragoza, Spain, to San Juan, Puerto Rico.

2. On 12 July 1976 the firm Fernando Roque shipped the aforesaid trunk in Barcelona, Spain, in the vessel AMERSFOORT of the KNSM line, as it arises from Bill of Lading No. 12 (Exhibit 11(a)). The consignee of said cargo was coplaintiff Pedro

Juan Soto, with address at Q Condominium, 6013 A Quintana, Hato Rey, Puerto Rico 00917. The reference number for the shipment was 1211-R-4910606.

3. The trunk was received in the port of San Juan, Puerto Rico on 26 July 1976. The consignee company for the shipment, who did the unloading of the merchandise, was Caribe Shipping Co., Inc., the defendant herein.

4. The term provided for the claim of baggage having elapsed without the same having been claimed and following the then current regulations, the U.S. Customs Service sent the trunk to the warehouse of Almacenes Miramar, a customs duty warehouse, on 12 August 1976.

5. On 19 August 1976 a fire started in a business known as Perez Distributors, Inc., located in the vicinity of Almacenes Miramar. Said fire destroyed several structures, among them those of Almacenes Miramar. As a consequence of the disaster, the trunk and the effects that were inside it disappeared.

6. The defendant, Caribe Shipping Co., Inc., was the firm that was the agent for the owner of the vessel. The vessel's agent notifies the consignee of the arrival of the merchandise by mailing a copy of the bill of lading with a stamp of "Notice of Arrival." The individual in charge of sending out the notices testified that he does not have any obligation to do so, but that he sends out thousands of notices of arrival.

7. In late July the plaintiff received from Fernando Roque a letter dated 19 July 1976 notifying him that the trunk with personal effects had been dispatched from customs destined for Puerto Rico. They included for him the original and a copy of the bill of lading. Said document includes the vessel in which the merchandise was shipped, the "AMERSFOORT," and the port of destination, San Juan, Puerto Rico. Neither the pier nor the date of arrival nor the agent in charge arise from the bill of lading.

8. The defendant had knowledge of the arrival of the ship that was transporting the trunk to the port of San Juan, Puerto Rico, on 26 July 1976. The firm made the arrangements to dock the ship and for its offloading.

9. The defendant alleges that it notified the plaintiff about the arrival of the trunk by mailing to him via ordinary mail three days prior to the arrival of the ship a copy of the bill of lading whereon a stamp called "Notice of arrival of cargo" had been imprinted, that indicated that the cargo would arrive on 27 July 1976 and that "if it is not picked up on time, this cargo will be sent to a public warehouse approximately on Aug. 3, 1976." This procedure was the one that the defendant party habitually used to notify consignees of the arrival of merchandise destined for them.

10. Mr. Pedro Juan Soto, as a matter of fact, never received the noticing document described in the preceding paragraph. Mr. Soto returned from Spain on 8 July 1976 and went to reside in his apartment in the Quintana Condominium. During his absence the apartment remained empty. His parents picked up his mail. Mr. Soto's experience with the mail was that it was safe; they had iron bars in the condominium and he did not know that any of his correspondence had been lost.

11. The plaintiff learned who was the agent in charge of unloading the vessel when he wrote to Fernando Roque on 4 November 1976, worried about the delay in the arrival of the same. Fernando Roque sends him the address of the consignee company and indicates to him that it is strange that he has not received a notice of arrival from said company (Plaintiff's Exhibit II). When he communicates with the defendant, he learns of the fire and the loss of the trunk.

12. The plaintiff made the corresponding extrajudicial claims, both to the defendant Caribe Shipping Co., Inc., and to the firm of Fernando Roque Transportes Internacionales, S.A., but they resulted fruitless.

13. Things thus standing, they filed a complaint against Caribe Shipping Co., Inc., on 20 April 1977.

Pursuant to the foregoing findings of fact, we formulate the following:

CONCLUSIONS OF LAW

It must be clearly established that any liability that may be derived from this cause of action does not arise from the particular fact of the loss of the trunk. We are aware that the loss of the property as a result of the fire in the warehouse was an unforeseen and unavoidable fact, without intervention of guilt or negligence. It was an accident for which no person whatsoever answers in this case. *P.R. & American Ins. Co.* v. *Duran Manzanal*, 92 D.P.R. 289 (1965).

Now, in order to make a finding of negligence it is necessary that we consider how did the absence of notice of arrival of the merchandise contributed to the loss of the trunk; whether the lack of notice or the manner in which the same was sent constituted a negligent act.

As a matter of fact we must again point out that defendant Caribe Shipping Co., Inc. alleged that it notified the plaintiff about the arrival of the trunk by sending him three days prior to the arrival of the ship a copy of the bill of lading wherein the date of arrival of the ship was shown. It was also established that the plaintiff never received this document of notice.

The general rule is that in the absence of an agreement between the parties, delivery of the goods at the pier by the carrier, without notice or acceptance by the consignee, does not release the ship from liability as carrier. For it to be deemed a valid delivery, the master of the vessel must forward a notice to the consignee about the arrival of the goods and that the same are prepared for delivery. This duty exists provided always that the identity of the consignee is known and that the latter is accessible, so that he is afforded an opportunity to remove the merchandise or to place it in an appropriate place for its care.[1]

---

[1] Wharton Poor, *Poor on Charter Parties & Ocean Bills of Lading*, 5th Ed., Mathew Binder, Sec. 61.

Federal commentators and jurisprudence agree that the notice to be sent to the consignee constitutes a notice that the merchandise arrived at the port. A notice that merely states the date when the vessel is expected to arrive with its merchandise is not equivalent to a notice of arrival. Thus, they point out that the ship must be physically ready to receive the cargo or unload the merchandise before the notice of arrival is sent. It is pointed out in publication 2-B *Benedict on Admiralty*, 7th Ed., Chap. 11, pgs. 2-18, Sec. 33:

> "The ship must be ready to load or discharge cargo before tendering the notice of readiness. A notice of anticipated readiness is invalid."

Likewise, commentator Wharton Poor in his book *Poor on Charter Parties and Ocean Bills of Lading*, in Sec. 61 of the same, points out:

> "At the port of discharge, by the weight of authority the carrier's liability as such ends when notice of the goods' arrival has been given and a reasonable opportunity afforded the consignee to take them away. . . ."

In a decision of the state of New York facts similar to those of the case at bar are presented. In *General Refrigerators Corp.* v. *Acme Fast Freight*, 60 N.Y.S.2d 370 (1975), the parties had agreed on the transportation of certain merchandise to be taken to Dallas, Texas by ground transportation. The merchandise was destroyed in a fire that occurred in the defendant's warehouse. The defendant had sent a notice of arrival to the consignee, it being the only notice of arrival that was produced. It was stated in the same that the merchandise was en route and the date when storage was expected, should it not be picked up or received. In regard to this notice the Court pointed out the following:

> "I do not consider this an effective 'Arrival Notice' under the bill of lading. An 'Arrival Notice' signifies, it seems to me, that the shipment has arrived. It was expressly stated in this notice that the shipment was still en route. A statement of the carrier's expectation as to the day when the shipment would arrive by motor truck is not the equivalent of a notification of its arrival."

The importance of the notice of arrival in the course of merchandise traffic, whether maritime or ground, is evident. Its purpose is to give the consignee information about when will the ship with the merchandise arrive and where must he go to claim his merchandise or his cargo. On it depends that he appears within the regulatory time to pick up his property.

Having thus established the course that must be followed to send out the notice and having recognized its purpose, let us examine an important point about liability in the event of damage during the unloading period.

In 2 *Benedict on Admiralty*, pg. 11-7, Sec. 113, the following is pointed out:

> "It is clear that the carrier is liable for damage to the cargo resulting from negligence in its discharge by the carrier's employees or by the employees of any independent agency which the carrier engages to carry out its duty to effect discharge. *Where the employees of an independent agency are engaged by an outside entity, however, the carrier is not liable for damage to the cargo resulting from negligence in its discharge.*" (Emphasis added).

This assertion by Benedict to which we have added emphasis leads us to distinguish the work performed by the shipping agent in maritime traffic.

Normally the people who handle the entire process of discharging or unloading a vessel are those known as "Shipping

Agents." In the generality of cases the agent is the company that represents the shipowner in the port. This type of relationship is entered into through contracting. From the evidence presented it arises that the shipping agent is authorized by his principal to perform all necessary acts related to his business. Accordingly, among the functions that he performs is the one of preparing all of the documents, receiving the cargo that comes in the vessel, carry out the offloading of the ship, distribute and deliver the merchandise to the consignees. Together with this duty of the shipping agent is the one of giving the due notices of arrival to the consignees.

The federal standard on the liability of the shipping agent in case of claim has been interpreted on the basis of the doctrine of "*res inter alias acta alteri noncere non debet*," contracts will be effective only between the contracting parties. Let us see: In *Gulf Puerto Rico Lines* v. *Maicera Criolla, Inc.*, 309 F. Supp. 539 (1969), an action filed in the United States District Court for the District of Puerto Rico, the following situation occurred. The company Delta Steamship, Inc. initiated contractual freight relations with Maicera Criolla for the shipment of certain merchandise to Puerto Rico. The shipping agent for Delta Steamship in Puerto Rico was Gulf Puerto Rico Lines. The latter was not and never became the owner of the vessels used for transportation. The contract was executed only between Maicera Criolla and Delta Steamship, Inc. Taking these facts into consideration, which were not at controversy, the Court pointed out that the shipping agent, Gulf Puerto Rico Lines, was not liable for damages suffered by the merchandise during transportation because it never contracted for the transportation of the merchandise subject of the claim; that it should not be liable for the damages caused by Delta acting as carrier. Likewise, in a subsequent case, *Medina* v. *South Atlantic & Caribbean Line, Inc.*, 342 F. Supp. 498 (1972), also filed in the United States District Court for the District of Puerto Rico, the doctrine outlined in *Gulf Puerto Rico Lines*, *supra*, was cited with approval, to the

effects that contracts will be valid only between the parties bound therein, and it was further pointed out that an agent for a shipping company is not liable under an ocean marine freight contract.

Certainly the transportation contract in the case before us was executed between the plaintiff and Fernando Roque, a transportation company in Spain, the latter being the one who contracted the services of the ship AMERSFOORT for the final transportation of the merchandise to San Juan, Puerto Rico. Defendant Caribe Shipping Co., Inc. was the shipping agent for said ship and at no time did it appear as a party in the transportation contract. Its participation was limited to performing the functions that corresponded to it as agent.

It seems to us, then, that the situation at bar is distinguishable from the federal pronouncements in the sense that the claim made by the plaintiffs herein is not one arising from the breach of contractual relations but that it stems from a negligent act of the shipping agent in the performance of his functions as such. The agent's acts also do not fall under the provisions of COGSA, applicable to the aforesaid cases, contrary to this case. *Rhode Island Ins. Co.* v. *Pope & Talbot Lines*, *infra*.

It was the duty of Caribe Shipping to notify the consignee as to when and where would the merchandise be received, so that he would be able to go and pick up the same. The testimonial evidence presented about the sending out of the notice was unable to establish, in our judgment, that said notice was given diligently nor that there was any interest in the consignee receiving the same. Neither was it shown that it was done in accordance with what has been stated herein, in the sense that the notice should have been sent once the ship was ready to offload. On the contrary, it was alleged that the defendant had no obligation to give such notice; nevertheless, they point out that they are the people in charge of sending out such notices and that in fact they have sent out thousands of them.

It seems to us that if the shipping agent is knowledgeable of his work and therefore enjoys expertise and competence in the tasks that he performs, he is liable for negligent acts in which he may incur in the performance of such work. The defendants should not answer for an accidental event beyond their reach, nor for a contract whereby they were not bound, but they must answer for damages caused by their own negligence. It is foreseeable that if the consignee does not receive a notice he will not know when to go pick up his merchandise.

In *Rhode Island Ins. Co.* v. *Pope & Talbot Lines*, 78 D.P.R. 454 (1955), an action was filed for damages caused to a shipment of pears on board a steamship belonging to the plaintiffs. The Supreme Court of Puerto Rico concluded that the ocean marine carrier, Pacific Argentine Brazil Line, was negligent in the handling of this merchandise and held it liable for the totality of the damages. As to the shipping agent, Pope & Talbot Lines, codefendant, the Court pointed out:

> "As to Pope & Talbot Lines the situation is different. The latter limited itself to offload the merchandise and to deliver it to the consignee, acting as agent for Pope & Talbot Lines, Inc. Therefore, it is obvious that the Carrier of Goods by Sea Act is not applicable to it. It was not even a carrier as such term is defined in said Act, 46 U.S.C.A. Sec. 1301(a). The only way in which it could be charged with liability in this case would be affirmatively proving its negligence, which the evidence in this case fails to establish. As a consequence thereof, it must be released from liability for the damages had."

Professor Herminio M. Brau-del Toro in his work *Extracontractual Damages in Puerto Rico*, on page 7-1 points out that: "[It] can consequently be said that to incur in a negligent act means violating the duty imposed or acknowledged by law to exercise, as would a reasonable man, such care, caution, circumspection, diligence, vigilance and precaution that the cir-

cumstances of the case may require, so as not to expose to foreseeable and unreasonable risks of damages as a consequence of the acting party, those persons who, because they are not very remote from him, a prudent and reasonable man would have foreseen, within the circumstances of the case, would be exposed to the unreasonable risk created by the acting party."

The damage caused herein is a close and probable consequence of the defendant's conduct. The latter could and should have foreseen that a failure to send out the notice of arrival could result in the loss of the merchandise.

The defendant had no obligation to foresee that the merchandise could be lost in a fire, but it did as to the fact that if it failed to send out the notice the consignee would not show to pick up the merchandise, there existing the possibility of the same being lost amidst all the traffic and work that occurs in a port. Furthermore, the consignee company had knowledge that should the consignee not show to claim the merchandise, the same would be stored with the possibility that they would subsequently proceed to sell it at public auction, pursuant to federal regulations. See 19 U.S.C.A. 1490 *et seq.*

This consequence falls within the reasonable scope of probability. We understand that it is not such a remote or unusual fact that a prudent and reasonable man could have not foreseen.

The standard of anticipating a risk is not limited to having foreseen the specific risk or the exact circumstances entailed. What is essential is to have the duty to generally foresee consequences of a specific type. *Gines* v. *A.A.A.*, 86 D.P.R. 518 (1962).

Examining the event retrospectively, the negligent act arises as a reasonable consequence of the damage. That was the substantial factor in the consequences suffered by the adversely affected party. A defendant is liable if its negligence is a proximate cause, even if it is not the only proximate cause of such damage. *Gines Melendez* v. *A.A.A.*, *supra; Vda. de Andino* v. *A.F.F.*, 98 D.P.R. 170 (1966).

We can sustain that the probability of the damaging act occurring would have been much lower had it not been for the negligent act. *Mendez Purcell* v. *A.F.F.*, 110 D.P.R. 130 (1980).

The loss of the trunk can be attributed directly to the lack of notice, omission for which the defendant is liable.

We do not want to overlook the presumption established by our rules of evidence regarding notices addressed and sent by mail. Rule 16 of Evidence, subparagraph 24, states:

> "That a letter duly addressed and sent by mail was received in due time."

The jurisprudential pronouncement that is closest to an interpretation of this presumption or rule of evidence is *Diaz de Diana* v. *A.J.A.S. Ins. Co.*, 110 D.P.R. 471 (1980). The Supreme Court concluded that proof of mailing of a letter creates at most the controvertible presumption that it was received. When the presumption is refuted, it can not prevail. The Court resolves:

> "The alleged letter of 12 March 1975, if it was remitted at all, should not have for that single fact the effect of interrupting the prescription, if the evidence shows that in fact it was not received."

The Court continues to point out:

> "The reason for the requirement to be effected in optimal conditions that propitiate its arrival to the knowledge of the debtor seems obvious to us. On the one hand, if the receipt of the requirement is proven, certainty is given to the fact that such requirement was made and to the interruptive effect of the prescription, a fact that behooves the creditor to prove satisfactorily."

Following our rules of evidence and our jurisprudence, we conclude that the presumption of the sending and receipt of the letter was destroyed.[2] The evidence presented by the plaintiff showed that he never received the notice of arrival in question.

For the purpose of this type of notice to be achieved, the party that has the obligation to send out the same must be attentive and diligent in the compliance with this task. It must exercise the greatest possible care and interest that will allow it to have the certainty that the notice was received, especially when, like in the case at bar there are materials, money or fungible merchandise involved where the possibility of loss or damage which must be avoided by all possible methods is always foreseeable.

In consonance with the foregoing findings of fact and conclusions of law, the Court issues the following:

R-E-S-O-L-U-T-I-O-N

It is resolved that the defendants are liable for the damages caused by the loss of the trunk. At a Motion from a party a hearing will be set to determine the damages caused.

NOTIFY.

Given in Carolina, Puerto Rico, on 28 March 1985.

/SGD/ JUAN A. ARILL MIRANDA

JUAN A. ARILL MIRANDA
Superior Court Judge

Notified with a copy of the foregoing Resolution:

Mr. Marcos Rodriguez-Frese, Esq. — 801-B Banco Cooperativo, 623 Ponce de Leon, Hato Rey, Puerto Rico 00917

Mr. Harry Anduze-Montano, Esq. — Box 2219, Hato Rey, PR — Today, 2 April 1985.

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[2] Rules of Evidence, Rule 14; *Ibanez Benitez* v. *Molinos de Puerto Rico*, opinion of 16 March 1983, 83 J.T.S. 30.

I CERTIFY:
DORIS MORALES
Gen. Clk.

/SGD/ S. MATOS

By: SANDRA MATOS
Dep. Clk.

— CERTIFIED —
To be a correct translation prepared by:

ERNESTO QUIDGLEY
Certified Court Interpreter by the
Administrative Office of the
United States Courts
(P.L. 95-539, 28 USC 1827)

232 Upsala Street, College Park
Rio Piedras, Puerto Rico 00921
(809) 751-8334

9-27-91

APPENDIX G

CERTIFIED TRANSLATION:
9-28-91

AOC Form 704
(Notice of Judgment)

IN THE SUPERIOR COURT OF PUERTO RICO
CAROLINA SECTION

Civil No. 85-2803 (A)
On: Damages

UNITED STATES OF AMERICA,
THE PRESIDENT OF THE U.S.,
PEDRO JUAN SOTO AND/OR

PLAINTIFF

v.

CARIBE SHIPPING CO., INC.,

DEFENDANT

NOTICE OF JUDGMENT

To: Mr. Marcos Rodriguez-Frese, Esq. — 801-B Banco Corp. Building — #623 Ponce de Leon, Hato Rey, PR 00917

Mr. Efrain Guzman-Mollet, Esq. — Suite 907, Banco de Ponce Bldg., 1250 Ponce de Leon Ave., Santurce, PR 00907

THE UNDERSIGNED CLERK notifies you that this Court has entered judgment in the case at caption as of *14 July* 1987, which has been duly registered and entered in the case files of

this matter, wherefrom you may learn in detail the terms of the same.

And you being or representing the party affected by the judgment, which may be appealed, I address this notice to you, having placed in the case files a copy of the same on *16 July 1987*.

Carolina, P.R., on *16 July* 1987.

/SGD/ W. ESTRADA

By: W. ESTRADA - Clerk

Dep. Clk.

(There is the Round Stamp of the COMMONWEALTH OF PUERTO RICO, GENERAL COURT OF JUSTICE, SUPERIOR COURT, CAROLINA SECTION.)

— CERTIFIED —
To be a correct translation prepared by:

ERNESTO QUIDGLEY
U.S. Certified Court Interpreter
(P.L. 95-539, 28 USC 1827)

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(809) 751-8334

9-28-91

APPENDIX H

CERTIFIED TRANSLATION:
9-28-91

IN THE SUPERIOR COURT OF PUERTO RICO
CAROLINA SECTION

Civil No.: 85-2803 (801)
On: Damages

PEDRO JUAN SOTO AND HIS WIFE
MRS. CARMEN LUGO-FILIPPI,
PLAINTIFFS

v.

CARIBE SHIPPING COMPANY, INC.,
DEFENDANT

OPINION AND JUDGMENT

I. NARRATIVE OF THE CASE

This is a claim that arises as a consequence of the loss of a trunk belonging to the plaintiffs, Mr. Pedro Juan Soto and his wife Mrs. Carmen Lugo Filippi. This trunk had been sent on 12 July 1976 from the city of Zaragoza, Spain, with San Juan, Puerto Rico as its destination.

The plaintiffs allege that the defendant incurred in negligence when it failed to notify them, the owners and consignees of the trunk, of the arrival at port of the ship wherein the cargo was transported. Because the trunk was not claimed, the same was deposited in a public warehouse, property of a third party, where it was destroyed by a fire.

The defendant adduces that it notified the plaintiff with a copy of the bill of lading about the date of arrival of the ship at

the port of San Juan, the date when the merchandise would be put in storage by provision of the customs law and that therefore the applicable statutes and the bill of lading exempt it from liability.

The parties agreed, with the acquiescence of the Court, to present only the proof on negligence. Therefore, the decision of the Court will be limited to determining whether in accordance with the circumstances of the instant case the defendant incurred in any type of negligence that imposes on it the obligation to answer for the loss of the trunk.

On 30 January 1979, after the required procedural actions, a hearing on the case was held wherein the parties presented their testimonial and documentary evidence. The Court requested simultaneous memorandums of law from both parties, to be filed within forty-five (45) days after the hearing. On 19 March 1979 the plaintiff party filed a Memorandum of Authorities in support of its position. The defendants did not file any memorandum whatsoever.

This Court issued a Resolution dated 28 March 1985, notified on 2 April 1985. On that occasion it was determined that the defendant, Caribe Shipping Co., Inc., had incurred in negligence and was liable for the damages caused by the loss of the trunk.

After the aforesaid Resolution, a hearing was held on 12 November 1985 wherein the Pretrial Conference Report was submitted. Once the report was discussed, the Court requested from the parties that they submit memorandums wherein they discussed in detail the defenses raised by the defendants and the opposition to said defenses by the plaintiffs.

The parties have appeared and have filed several documents wherein they raise: the occupation of the field by a federal law, the United States Carrier Goods [sic] by Sea Act of 1936 (COGSA), Title 46 USCS Sec. 1300 *et seq.*; the limitation of $500.00 established by federal law in cases wherein undeclared crated merchandise is lost; and that it is proper to dismissed the action filed because of failure to establish the ele-

ments required by our ordainment to establish a cause of action under Art. 1802 of the Civil Code of Puerto Rico, 31 LPRA Sec. 5141. There is also discussion as to whether the defendant was or not a public carrier or whether instead it was acting as an agent.

Having analyzed the evidence in the case file submitted by the parties and having studied the arguments presented in the memorandums, this Court understands that it is proper to reconsider the Resolution of 28 March. To those effects it issues this opinion and passes judgment in accordance therewith. There is no impediment whatsoever for the reconsideration of the previous resolution because in the case at bar no definitive judgment has been entered adjudging the claims, rights and obligations of the parties. Rule 43.5 of Civil Procedure of 1979, 32 LPRA; *Teachers' Association* v. *Santa Barbara*, 112 DPR 33 (1982); *Diaz-Burgos* v. *Puerto Rico Maritime Shipping Authority*, 87 JTS 11, page 4714.

This Court reaffirms its findings of fact that are now detailed:

II. Findings Of Fact

1. The plaintiff party contracted the services of the firm Fernando Roque, Transportes Internacionales, S.A., shipping agent, for the transportation of a trunk that contained personal effects from Zaragoza, Spain, to San Juan, Puerto Rico.

2. On 12 July 1976 the firm Fernando Roque shipped the aforesaid trunk in Barcelona, Spain, in the vessel Amersfoort of the KNSM line, as it arises from Bill of Lading No. 12 (Exhibit 11(a)). The consignee of said cargo was coplaintiff Pedro Juan Soto, with address at Q Condominium, 6013 A Quintana, Hato Rey, Puerto Rico 00917. The reference number for the shipment was 1211-R-4910606.

3. The trunk was received in the port of San Juan, Puerto Rico on 26 July 1976. The consignee company for the shipment, who did the unloading of the merchandise, was Caribe Shipping Co., Inc., the defendant herein.

4. The term provided for the claim of baggage having elapsed without the same having been claimed and following the then current regulations, the U.S. Customs Service sent the trunk to the warehouse of Almacenes Miramar, a customs duty warehouse, on 12 August 1976.

5. On 19 August 1976 a fire started in a business known as Perez Distributors, Inc., located in the vicinity of Almacenes Miramar. Said fire destroyed several structures, among them those of Almacenes Miramar. As a consequence of the disaster, the trunk and the effects that were inside it disappeared.

6. The defendant, Caribe Shipping Co., Inc., was the firm that was the agent for the owner of the vessel. The vessel's agent notifies the consignees of the arrival of the merchandise by mailing a copy of the bill of lading with a stamp of "Notice of Arrival." The individual in charge of sending out the notices testified that he does not have any obligation to do so, but that he sends out thousands of notices of arrival.

7. In late July the plaintiff received from Fernando Roque a letter dated 19 July 1976 notifying him that the trunk with personal effects had been dispatched from Spain destined for Puerto Rico. They included for him the original and a copy of the bill of lading. Said document includes the vessel in which the merchandise was shipped, the "AMERSFOORT," and the port of destination, San Juan, Puerto Rico. Neither the pier nor the date of arrival nor the agent in charge arise from the bill of lading.

8. The defendant had knowledge of the arrival of the ship that was transporting the trunk to the port of San Juan, Puerto Rico, on 26 July 1976. The firm made the arrangements to dock the ship and for its offloading.

9. The defendant alleges that it notified the plaintiff about the arrival of the trunk by mailing to him via ordinary mail three days prior to the arrival of the ship a copy of the bill of lading whereon a stamp called "Notice of arrival of cargo" had been imprinted, that indicated that the cargo would arrive on 27 July 1976 and that "if it is not picked up on time, this cargo

will be sent to a public warehouse approximately on Aug. 3, 1976." This procedure was the one that the defendant party habitually used to notify consignees of the arrival of merchandise destined for them.

10. Mr. Pedro Juan Soto, as a matter of fact, never received the noticing document described in the preceding paragraph. Mr. Soto returned from Spain on 8 July 1976 and went to reside in his apartment in the Quintana Condominium. During his absence the apartment remained empty. His parents picked up his mail. Mr. Soto's experience with the mail was that it was safe; they had iron bars in the condominium and he did not know that any of his correspondence had been lost.

11. The plaintiff learned who was the agent in charge of unloading the vessel when he wrote to Fernando Roque on 4 November 1976, worried about the delay in the arrival of the same. Fernando Roque sends him the address of the consignee company and indicates to him that it is strange that he has not received a notice of arrival from said company (Plaintiff's Exhibit II). When he communicates with the defendant, he learns of the fire and the loss of the trunk.

12. The plaintiff made the corresponding extrajudicial claims, both to the defendant Caribe Shipping Co., Inc., and to the firm of Fernando Roque Transportes Internacionales, S.A., but they resulted fruitless.

13. Things thus standing, they filed a complaint against Caribe Shipping Co., Inc., on 20 April 1977.

In addition to the foregoing findings, the Court issues the following findings after having re-examined the evidence and having seen the memorandums of the parties:

14. The bill of lading did not specify the contents of the trunk nor did it state a value for the contents of undeclared crated merchandise.

15. From the evidence submitted by the plaintiff party it arises that it was the United States Customs Service who sent the trunk to the warehouse of Almacenes Miramar on 12

August 1976. It was sent because the term of five (5) days that at that time was provided in the then current regulations had elapsed without the baggage having been claimed. Customs Duties, 19 USC Sec. 1490; General Order No. MI 12957. (Exhibit 9, letter of 12 March 1977).

16. From the same evidence submitted by the plaintiff party it also arises that the fire in question started in the business of Perez Distributors, Inc. From there it spread to a second business called Richardson-Mercel Interamerica Distributors, Inc. From there it spread to a third locale, an office for the files of Caribbean Bunkers, Inc. and finally the fire spread to the warehouse of Almacenes Miramar. (Exhibit 10, letter of 6 April 1977).

Pursuant to the foregoing findings of fact, we formulate the following:

III. Conclusions Of Law

In the case at bar there is no claim against Caribe Shipping nor against any other person in its capacity as depositary of the trunk lost due to the fire. In mercantile law the depositary is made responsible for the conservation of the thing given in deposit. In addition, in the event of the loss of the thing given in deposit, the obligation is imposed on the depositary to prove that the accident that caused the loss of the thing was not due to his negligence but to *force majeure*. Articles 221 and 224 of the Commerce Code, 10 LPRA Sec. 1621 and 1624. This same standard governs in our jurisdiction in matters relative to the civil deposit contract. *Hernandez* v. *Rodriguez Soto*, 97 DPR 214 (1969); *PRAICO* v. *Durand Manzanal*, 92 DPR 289 (1965).

The plaintiff party only alleged against Caribe Shipping that it was negligent by failing to notify the arrival of the merchandise and that such negligence contributed to the loss of the trunk.

In this Opinion and Judgment, like in the Resolution that was issued on 25 [sic] March, we reiterate that the fire that destroyed the warehouse and the trunk was an unforeseeable, fortuitous event, unavoidable by the defendant, Caribe Shipping. For such reason no liability whatsoever can be charged to the defendant for these facts. *PRAICO* v. *Durand Manzanal*, *supra*; *Pacheco* v. *AFF*, 112 DPR 296 (1982). The fire started at a business known as Perez Distributors, Inc. and from there it spread to another two (2) structures until it finally spread to the warehouse where the trunk was located. The depositary had no relationship whatsoever with Caribe Shipping, the defendant herein.

The trunk was sent to the warehouse by order of the Customs Service in view that it was not claimed within the term set forth by law. Title 19 USC Sec. 1490. The determination of whether the defendant did or did not notify the arrival of the trunk is one that for the effects of the conclusions of law does not contribute any substantial element whatsoever. The conduct of the defendant, Caribe Shipping, of sending the trunk to the warehouse was not the proximate and efficient cause of the damage occurred. The fire as a fortuitous event acted as an intervening cause of the damages that may have been caused. *Vda. de Andino* v. *AFF*, 93 DPR 170 (1966); *Gines* v. *AAA*, 83 DPR 518 (1962). No liability whatsoever can be imposed on the defendant because of a fire that was not foreseeable and that occurred seven (7) days after the law that ordered that the unclaimed merchandise was to be sent to the warehouse was complied with. *Colon* v. *Shell*, 55 DPR 592 (1939); *Silva Matos* v. *A. Diaz*, 95 DPR 902 (1968); *Gananciales* v. *Geronimo Corp.*, 95 DPR 902 (1968). [sic]

Coplaintiff Pedro Juan Soto waited nearly four (4) months before he inquired from Mr. Fernando Roque the whereabouts of the trunk. Had the fire not acted as an intervening cause, coplaintiff Pedro Juan Soto would have been able to pick up the trunk in question. Current law requires that unclaimed merchandise, except for some circumstance not appli-

cable in this case, remain in the warehouse at least for one (1) year. After that year the same may be sold at public auction. 19 CFR Sec. 127, Customs Duties.

JUDGMENT

In view of the foregoing, the complaint is DENIED and the case is ordered DISMISSED.

RECORD AND NOTIFY.

Given in Bayamon for Carolina, Puerto Rico, on 14 July 1987.

/ INITIALS / J.A.A.M.

JUAN A. ARILL-MIRANDA
Superior Court Judge

— CERTIFIED —
To be a correct translation prepared by:

ERNESTO QUIDGLEY
U.S. Certified Court Interpreter
(P.L. 95-539, 28 USC 1827)

232 Upsala Street, College Park
Rio Piedras, Puerto Rico 00921
(809) 751-8334

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